Supreme Court, U.S.
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No._____

In The
Supreme Court of the United States
October Term, 1995

ARNOLD AND BAKER FARMS, a partnership

Petitioner,

v.

UNITED STATES OF AMERICA,
on behalf of the FARMERS HOME ADMINISTRATION,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the direct transfer to an oversecured creditor of a portion of its collateral at a value determined by the Bankruptcy Court constitutes the "indubitable equivalent" of its allowed secured claim for purposes of 11 U.S.C. § 1129(b)(2)(A)(iii)?

2. What is the proper standard of review for determinations of "indubitable equivalence" under 11 U.S.C. § 1129(b)(2)(A)(iii)?

LIST OF PARTIES

The parties are the Petitioner, Arnold and Baker Farms, a partnership, Debtor and Debtor-in-Possession in bankruptcy ("Debtor" or "Arnold & Baker"), Respondent, United States of America, on behalf of the Farmers Home Administration, ("Farmers Home Administration") a secured creditor, and Western Cotton Services Corporation, formerly known as Anderson Clayton Co., ("Western Cotton") a secured creditor and Co-Appellant in the court below.

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Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Arnold and Baker Farms, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered June 7, 1996.

DISCUSSIONS AND OPINIONS OF LOWER COURTS

On May 5, 1993, the United States Bankruptcy Court for the District of Arizona entered its Order confirming Arnold & Baker's Plan of Reorganization (the "Order"), In re Arnold & Baker Farms, Ch. 11 Case No. B-86-01195-PHX-RTB, docket at 383 (Bankr. D. Ariz. May 5, 1993). The Order has not been officially reported. The Order is reprinted in the appendix hereto at page 1a.

The Opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit (the "Bankruptcy Appellate Panel") reversing the Bankruptcy Court's Order was entered on December 30, 1994, is reported at 177 B.R. 648 (Bankr. 9th Cir. 1994), and is reprinted in the appendix hereto at page 8a.

The Opinion of the Ninth Circuit Court of Appeals affirming the Bankruptcy Appellate Panel decision was entered June 7, 1996, is reported at 85 F.3d 1415 (9th Cir. 1996), and is reprinted in the appendix hereto at page 38a.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its Opinion on June 7, 1996. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. 11 U.S.C. § 1129(b)(2)(A)(iii) which provides:

> (2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides--
>
> * * *
>
> (iii) for the realization by such holders of the indubitable equivalent of such claims.

STATEMENT OF THE CASE

In its Plan of Reorganization, Arnold & Baker made provision for payment of the claim of Farmers Home Administration by the direct transfer of 566.5 acres of its real property collateral valued by the Bankruptcy Court at $7,300.00 per acre, or $4,135,450.00, in full satisfaction of Farmers Home Administration's allowed secured claim in the amount

of $3,837,618.00, which was originally secured by approximately 1,320 acres of real property.

Farmers Home Administration objected to confirmation of the Plan, claiming that without recourse to the remaining acres, transfer of part of its collateral, whatever the value, could never constitute the "indubitable equivalent" of its claim, if a subsequent commercially reasonable sale did not actually result in payment of the full amount of the claim.

The Bankruptcy Court, found that the amount Farmers Home Administration was entitled to receive was the value of its claim, not the value of its collateral, determined that the Plan provided 100% payment of its claim, overruled Farmers Home Administration's objection and confirmed Debtor's Plan. Farmers Home Administration appealed to the Bankruptcy Appellate Panel which reversed the Bankruptcy Court's confirmation Order. Debtor and Western Cotton appealed to the Ninth Circuit Court of Appeals which affirmed the Bankruptcy Appellate Panel's determination.

The Ninth Circuit Court of Appeals held that (1) the question of whether a plan provides a secured creditor with the indubitable equivalent of its claim is a question of law to be reviewed de novo; and (2)the direct transfer of 566.5 acres of real property valued by the Bankruptcy Court at $4,135,450.00 was not the indubitable equivalent of an oversecured claim in the amount of $3,837,618.00 originally secured by 1,320 acres of land.

REASONS FOR GRANTING THE WRIT

I. A DIVISION AMONG THE CIRCUIT COURTS OF APPEALS EXISTS REGARDING WHETHER THE DETERMINATION OF "INDUBITABLE EQUIVALENCE" IS A QUESTION OF LAW TO BE REVIEWED DE NOVO OR IS A QUESTION OF FACT TO BE REVIEWED FOR CLEAR ERROR.

The court below held that the determination of "indubitable equivalence" is a question of law to be reviewed de novo. In re Arnold & Baker Farms, 85 F.3d 1415, 1421 (9th Cir. 1996) and Appendix at 50a.

The court below acknowledged its disagreement with the Seventh Circuit Court of Appeals regarding the proper standard of review by citing the contrary authority of In re James Wilson Assoc., 965 F.2d 160, 172 (7th Cir. 1992) ("indubitable equivalence" is a question of fact reviewed for clear error). Id. Additionally, the decision of the court below is contrary to the law of at least four other circuits which have held that the question of "indubitable equivalence" is a question of fact to be reviewed for clear error. See In re Sun Country Dev., Inc., 764 F.2d 406, 409 (5th Cir. 1985) (Chapter 11 plan providing substituted collateral to secured creditor as the "indubitable equivalent" of its allowed secured claim confirmed over secured creditor's objection where valuation findings by Bankruptcy Court were supported by the record notwithstanding conflicting evidence); In re Snowshoe Co., Inc., 789 F.2d 1085, 1088 (4th Cir. 1986) (". . . we conclude that a judicial determination of such adequate protection [for purposes of § 361(3)] is a question of fact rooted in measurements of value and credibility of witnesses."); In re Martin, 761 F.2d 472, 474, 476-77 (8th Cir. 1985); In re George Ruggiere Chrysler-Plymouth, 727 F.2d 1017, 1019-20 (11th Cir. 1984).

The United States Supreme Court has granted review where there is a square and irreconcilable conflict among the circuits. See McElroy v. United States, 455 U.S. 642, 643 (1982). The Supreme Court of the United States should grant certiorari in this case to settle the question of the proper standard of review for determinations of "indubitable equivalence".

II. A DIVISION AMONG THE CIRCUIT COURTS OF APPEALS EXISTS AS TO WHETHER A PARTIAL RETURN OF COLLATERAL TO A SECURED CREDITOR AT A VALUE DETERMINED BY THE BANKRUPTCY COURT CAN CONSTITUTE THE "INDUBITABLE EQUIVALENT" OF THE SECURED CREDITOR'S CLAIM FOR PURPOSES OF 11 U.S.C. § 1129(b)(2)(A)(iii).

The Fifth Circuit Court of Appeals in In re Sandy Ridge Dev. Co., 881 F.2d 1346, 1354 (5th Cir. 1989), reh'g denied, 889 F.2d 663 (5th Cir. 1989),

held that the "indubitable equivalence" standard of 11 U.S.C. § 1129(b)(2)(A)(iii) could be satisfied by the return to the secured creditor of its collateral with a credit against the debt equal to "the value properly fixed by the bankruptcy court." Sandy Ridge, 881 F.2d at 1354 (emphasis added).

In the present case, the court below held that the Bankruptcy Court's determination of value was not clearly erroneous, but, nevertheless, was insufficient to satisfy the "indubitable equivalence" standard. The Ninth Circuit determined that the Bankruptcy Court's valuation under 11 U.S.C. § 506 does not necessarily constitute the "indubitable equivalent" of a claim essentially because "determining the value of real property at any given time is not an exact science." 85 F.3d at 1421 and Appendix at 51a. The Court of Appeals failed to articulate any legal basis for its determination that the "indubitable equivalence" had not been met in this case.

The Ninth Circuit's essential holding is that when there is a partial distribution of the collateral to a secured creditor in satisfaction of its secured claim, the substitute does not insure the safety of or prevent jeopardy to the principal. 85 F.3d at 1422 and Appendix at 52a. We are left, in the end, with the conclusion that a plan such as that in the present case, which proposes a partial surrender of collateral of an oversecured creditor in full and final satisfaction of its debts for its secured claim, is impermissible as a matter of law in the Ninth Circuit.

What the Ninth Circuit has done, is to tacitly set forth a rule of law whereby no plan may provide for the partial return to an oversecured creditor of its collateral in full and final satisfaction of its debt where there is any dispute as to value. While the Ninth Circuit stated in conclusion that its holding was not that a partial return of collateral can never satisfy the "indubitable equivalent" standard, a fair reading of the Opinion compels the opposite conclusion. It is impossible to posit a situation where a partial return of collateral can satisfy 11 U.S.C. § 1129(b)(2)(A)(iii) if there is

a value dispute between the debtor and creditor. The instant case presented a very favorable factual pattern for the partial return of collateral under 11 U.S.C. § 1129(b)(2)(A)(iii), given the Bankruptcy Judge's clear grasp of the issue related to his value determination. In short, if a partial return of collateral is not indicated in the present case, it will never be indicated. Thus, a conflict with the Fifth Circuit in Sandy Ridge exists.

Moreover, the Ninth Circuit's ruling necessarily contemplates that in order to establish the proper credit on Farmers Home Administration's claim for purposes of the "indubitable equivalent" standard the parties are required to await an actual sale by the Debtor or Farmers Home Administration of the property, i.e., that the "indubitable equivalent" standard cannot be satisfied an evidentiary hearing. 85 F.3d at 1422 and Appendix at 53a. This position is directly contrary to the law of the Fifth Circuit in Sandy Ridge which flatly rejected the identical argument:

> However we must reject [secured creditor's] argument that the bankruptcy court cannot set the value of property but instead must in all instances require the debtor to abandon the property and let the foreclosure sale market determine its price. This is simply not required by the Code. Section 506(a) provides that "value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of the property, and in conjunction with any hearing on such disposition or use on a plan affecting such creditor's interest." It seems contemplated that this determination is to be made by the court. Furthermore, we have recently held that "[t]he valuation of the assets of a debtor in bankruptcy . . . is an integral part of the confirmation process under Chapter 11." Texas Extrusion, 844 F.2d at 1165. [Secured creditor] contends that the abandonment/foreclosure route is necessary to protect its interest in the

> face of a declining real estate market, since by bidding in at two-thirds (2/3) of the current appraised market value it will be protected from some of the decline. While [secured creditor] has valid concerns regarding such market conditions, it is clear that these market factors must be taken into account by the bankruptcy court when valuing collateral. 3 Collier on Bankruptcy at 506-25. Although we recognize that property valuation is not an exact science, it remains an integral part of the bankruptcy process.

881 F.2d at 1354 (emphasis added); See also, Sun Country, 764 F.2d at 409 (determination of substituted collateral for purposes of indubitable equivalent standard based on conflicting testimony at trial would not be reversed on appeal as the findings were supported by the evidence).

The Ninth Circuit's attempt in the present case to distinguish Sandy Ridge on the ground that the plan in that case provided for the transfer of all of the secured creditor's collateral rather than only a portion of the secured creditor's collateral, as in the present case, is unsound. See 85 F.3d at 1423 and Appendix at 55a. Even in a situation where a debtor is returning all of the collateral of a secured creditor in satisfaction of its allowed secured claim, the Bankruptcy Court's valuation determination is critical to the creditor's substantive rights because the creditor's rights regarding an unsecured deficiency claim, as was the case in Sandy Ridge, are directly impacted by the valuation determination. See 11 U.S.C. § 506. Thus, the identical concerns are present whether the debtor's plan proposes to transfer all or a portion of a secured creditor's collateral under a plan.

As a practical matter, a split in the Circuits exists on this issue between the Fifth Circuit Court of Appeals in Sandy Ridge and the Ninth Circuit Court of Appeals in the present case. Review should be granted in order to resolve the conflict between

the Circuits on this important issue of federal statutory construction.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION OF STATUTORY CONSTRUCTION REGARDING THE PROVISIONS OF THE BANKRUPTCY CODE GOVERNING CONFIRMATION OF CHAPTER 11 PLANS OF REORGANIZATION.

The Bankruptcy Code permits a court to confirm a Chapter 11 plan of reorganization, notwithstanding the objection of an impaired class, provided that the plan is "fair and equitable" with respect to the treatment of the claims of each impaired class of claims that has not accepted the plan. 11 U.S.C. § 1129(b)(1). A plan is "fair and equitable" if it allows a secured party to realize the "indubitable equivalent" of its claim. 11 U.S.C. § 1129(b)(2)(A)(iii).

The situation presented in the present case is one in which, based on the Bankruptcy Court's findings, Farmers Home Administration is wildly oversecured. In fact, based on the Bankruptcy Court's value determination, Farmers Home Administration had an equity cushion in its collateral over and above the allowed amount of its secured claim of approximately 100%. The Debtor and its general partners have no significant assets to contribute to this reorganization other than the Debtor's real property. Thus, it was logical, practical and efficient for the Court to confirm the Debtor's Plan which provided for satisfaction of Farmers Home Administration's debt, in full, by way of surrendering a portion of its collateral having a value sufficient to satisfy such claim in full.

The cases supporting such a plan are legion. See, Sandy Ridge, 881 F.2d 1346 (Chapter 11 plan which provides for the return of collateral to a secured creditor for a corresponding credit against the indebtedness in an amount equal to the value of the returned collateral is confirmable over the objection of the secured creditor); In re Atlanta So. Business Park, Ltd., 173 B.R. 444 (Bankr. N.D. Ga. 1994) (Chapter 11 plan which provided for surre nder of a portion of the secured creditor's

collateral at a value determined by the court, plus cash, in full and final satisfaction of the allowed secured claim found to be "fair and equitable" and confirmed over objection of secured creditor; treatment constituted the "indubitable equivalent" of secured claim); In re Simons, 113 B.R. 942 (Bankr. W.D. Tex. 1990) (Chapter 11 plan found to be "fair and equitable" and confirmed which provided for the surrender of less than all of the real property collateral of an oversecured creditor as cancellation for equivalent portion of secured claim); See also, In re Peerman, 109 B.R. 718, 720 (Bankr. W.D. Tex. 1989); Elm Creek, 93 B.R. at 110-12; In re Bernard, 70 B.R. 181, 185 (Bankr. E.D. Ark. 1986); In re Fursman Ranch, 38 B.R. 907, 909 (Bankr. W.D. Mo. 1984); In re Shorten, 49 B.R. 722, 724 (Bankr. W.D. Mo. 1985).

The court in Bernard held:

> The indubitable equivalent of the [secured creditor's] claim may be achieved by abandoning to it all or a portion of its collateral of a value equal to the present value of its claim. (citation omitted).

70 B.R. at 185.

The Court in Atlanta So. held:

> A plan that includes the partial return of collateral may be confirmable under certain circumstances. One circumstance occurs where, as here, the creditor is oversecured and the value of the surrendered collateral is equivalent to the amount of the creditor's claim.

173 B.R. at 449 (emphasis added).

The Ninth Circuit appears, on the surface, to have held that a "dirt for debt" plan, such as that in the instant case, must be reviewed on a case-by-case basis and may be confirmed if "indubitable equivalence" is established, but that the applicable standard was not met in the present case. Closer

scrutiny reveals, however, that the Ninth Circuit failed to articulate any standard underlying its decision. Because the Bankruptcy Judge in this case made factual findings which satisfy all of the legal requirements articulated by the Ninth Circuit for establishing the "indubitable equivalent" standard, the Ninth Circuit erred in one of two ways: (1) in improperly substituting its judgment as to the facts from a cold and incomplete record for that of the Bankruptcy Judge who personally observed the witnesses (See Section IV), or (2) in tacitly promulgating an incorrect legal standard by which the partial surrender of collateral to an oversecured creditor can never as a matter of law satisfy the "indubitable equivalent" standard if there is any valuation dispute between a debtor and secured creditor (See Section II).

The United States Supreme Court has granted petitions for review of decisions involving statutory construction or application based on significance of the issue in the administration of the statute. See States v. Ruzicka, 329 U.S. 287 (1946). Review has also been granted where, as here, the importance of the issue may impact the agricultural community. See National Boiler Mktg. Ass'n v. United States, 436 U.S. 816, 820 (1978). Due to the fact that an agency of the United States is a party in this case, the importance of the issues in this case relates to the public interest if not merely to the particular parties involved. See Rice v. Sioux City Cemetery, 349 U.S. 70, 79 (1955).

Review should be granted in the present case in order to address the proper interpretation of 11 U.S.C. § 1129(b)(2)(A)(iii) in cases involving partial return of collateral.

IV. THE NINTH CIRCUIT COURT OF APPEALS DEPARTED FROM THE USUAL RULE OF APPELLATE REVIEW OF FACTUAL DETERMINATIONS.

The Ninth Circuit articulated a number of factors which must be present before the "indubitable equivalent" standard can be satisfied by the partial surrender of an oversecured

creditor's collateral. Those include the following: (1) that the plan not jeopardize the principal of the secured creditor's loan and insure the safety of such principal, (2) that the distribution to the secured creditor be completely compensatory, and (3) that the plan not increase the creditor's risk exposure. 85 F.3d at 1422 and Appendix at 53a - 54a. The Confirmation Order provides as follows:

> With respect to those classes of secured claims [which includes the claim of Farmers Home Administration], the plan provides that each holder of a claim of such class will receive under the plan on account of such claims property of a value, as of the Effective Date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

Appendix at 4a, ¶ 14(i).

> The court finds and concludes that with respect to the classes of allowed secured claims [which includes the claim of Farmers Home Administration], the plan provides for the realization by the holders of such claims of the indubitable equivalent of such claims by the transfer to such holders of a portion of the debtor's real property, which is the collateral securing such claims, of a value sufficient to satisfy such claims in full.

Appendix at 5a, ¶ 18.

The Bankruptcy Judge held that Farmers Home Administration's treatment under the Plan, based on his valuation, was such that Farmers Home Administration's claim would be receiving payment in full on the Effective Date of the Plan. Accordingly, the principal of Farmers Home Administration's loan was not jeopardized, its distribution was completely compensatory and no increased risk exposure was attendant.

The Bankruptcy Court's findings satisfied each of the applicable legal standards articulated by the Ninth Circuit. The Ninth Circuit expressly held that the Bankruptcy Judge's factual findings were not clearly erroneous and expressly refused to reverse the Bankruptcy Judge's finding of fact. 85 F.3d at 1422 and Appendix at 52a. No remand was ordered for further fact finding. Id.

It is a well-settled principle of appellate jurisprudence that deference is required to be given to the trial judge's opportunity to observe the demeanor of witnesses and the trial judge's personal experience with the controversy tried before him, See Bose Corp. v. Consumer's Union of U. S., Inc., 466 U.S. 485, 500, 104 S.Ct. 1949, 1959, 80 L.Ed.2d 502 (1983); Fed. R. Bankr. P. 8013 and that the mere showing that a Bankruptcy Court could have reached another conclusion based upon the evidence presented is insufficient to establish that clear error has been committed. See In re Huntington, Ltd., 654 F.2d 578, 583 (9th Cir. 1981).

In the present case, although it refused to reverse the Bankruptcy Judge's factual findings, the Ninth Circuit could nevertheless not resist second-guessing the Bankruptcy Court's factual findings as the basis for its reversal. 85 F.3d at 1422 and Appendix at 52a. The crux of the Ninth Circuit's holding can be found in its discomfort with the Bankruptcy Judge's factual determination, while at the same time being constrained by well-known principles of appellate jurisprudence to affirm the Bankruptcy Judge's valuation determination as not being clearly erroneous. 85 F.3d at 1422 and Appendix at 52a. The Ninth Circuit held as follows:

> Although we conclude that the Bankruptcy Court's valuation in this case is not clearly erroneous, we are not convinced that its finding regarding the value of the real property provided the indubitable equivalence of the particular secured claim in question, nor are we convinced that the partial distribution of 566.5 acres to FmHA will insure the

> safety or prevent jeopardy to the principal. . . .
>
> The evidence at trial demonstrated that the value of the real property was far from certain. . . .

Id.

The Ninth Circuit has simply second-guessed the Bankruptcy Judge's determination of "indubitable equivalence". It articulated no legal principle by which the Bankruptcy Judge committed error. The Ninth Circuit has committed error in substituting its judgment for the factual findings of the Bankruptcy Judge, which it found not to be clearly erroneous.

Similarly, the Ninth Circuit's observations that the Debtor's appraisal made reference to certain unfavorable market conditions and that there existed a large disparity in the opinions of the parties' appraisers cannot be found to render the Bankruptcy Judge's determination of indubitable equivalence reversible error. Can the Ninth Circuit really be saying that any time there is a large disparity in the parties' appraisal evidence that no binding value determination can be made by the Bankruptcy Judge?

The Ninth Circuit's decision is predicated upon isolated components of the valuation process which the Bankruptcy Judge considered in the totality of the circumstances of the evidence, and the case, in reaching his value finding. In essence, the Ninth Circuit held that the evidence in the record, which was plainly sufficient to support the valuation by the Bankruptcy Judge, was not credible. The fact that the Ninth Circuit was uncomfortable with the value determination, or that it could have come to a different determination if it had been the trier-of-fact, appears to have guided its determination. What is remarkable is that the Ninth Circuit was able to do this without the aid of a complete factual record. See 177 B.R. at 658 and Appendix at 22a. Farmers Home Administration refused to include in the record on its appeal to the Bankruptcy Appellate Panel those

portions of the trial transcript where its appraiser was cross-examined. (Needless to say it is the Debtor's opinion that such excerpts reveal the patent frailty of Farmers Home Administration's valuation case.) The Bankruptcy Appellate Panel was, by its own word, unable, because of Farmers Home Administration's strategy, to review the record for factual error. 177 B.R. at 658 and Appendix at 22a. Neither the Bankruptcy Appellate Panel nor the Ninth Circuit, therefore, could properly analyze the Debtor's valuation evidence, let alone predicate the tacit reversal of the Bankruptcy Judge's factual findings on the record provided. If the Ninth Circuit was convinced that the Bankruptcy Judge had made a clear error in his findings of fact, the it should have reversed that determination. Failing to do that, the Ninth Circuit improperly invaded the province of the Bankruptcy Judge as to factual findings.

The United States Supreme Court should grant review to rectify the Ninth Circuit's departure from the usual rule of appellate review of factual determinations.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the United States Supreme Court accept its Petition for Writ of Certiorari, reverse the Opinion of the Ninth Circuit Court of Appeals in this case, and determine that (1) the proper standard of review under 11 U.S.C. § 1129(b)(2)(A)(iii) is a review of factual determinations of value for clear error; and (2) the Bankruptcy Court's determination of value is sufficient to meet the "indubitable equivalence" standard of 11 U.S.C. § 1129(b)(2)(A)(iii), and that the matter be accordingly remanded with the

direction to reinstate the Bankruptcy Court's confirmation Order.

RESPECTFULLY SUBMITTED this 20 day of September, 1996.

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APPENDIX

Findings of Fact, Conclusions of Law and Order Confirming Plan of Reorganization of the United States Bankruptcy Court for the District of Arizona entered May 5, 1993 1a

Opinion of the United States Bankruptcy Appellate Panel of the Ninth Circuit filed December 30, 1994 . . . . . 8a

Order and *Amended Opinion* of the United States Bankruptcy Appellate Panel of the Ninth Circuit filed February 9, 1995 . . . .34a

Opinion of the United States Court of Appeals for the Ninth Circuit filed June 7, 1996 . . . . . 38a

APPENDIX "A"

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re	)	Chapter 11 Proceedings
	)	
ARNOLD & BAKER FARMS, a partnership,	)	Case No. B-86-01195-PHX-RTB
	)	**FINDINGS OF FACT,**
Debtor.	)	**CONCLUSIONS OF LAW AND**
	)	**ORDER CONFIRMING PLAN OF**
	)	**REORGANIZATION**

The Debtor's Second Amended Plan of Reorganization filed January 8, 1991, and incorporated herein by this reference as though fully restated (the "Plan") pursuant to the provisions of Chapter 11 of Title 11 of the United States Code (the "Code"), having been transmitted to the holders of impaired claims and interest holders and

IT HAVING BEEN DETERMINED AFTER DUE NOTICE TO ALL CREDITORS AND PARTIES IN INTEREST AND A HEARING;

1. Unless otherwise indicated herein, the definitions set forth in Article II of the Plan shall have the same meaning herein.

2. The Disclosure Statement distributed by the Debtor to each impaired class of creditors and interest holders was previously approved by this Court as containing "adequate information" as required by Section 1125(a) of the Bankruptcy Code in this Court's Order filed February 27, 1991.

3. On March 20, 1991, pursuant to Section 1125 of the Bankruptcy Code and Bankruptcy Rule 3017(d), authorized agents of the Debtor began a post-petition solicitation (the "Solicitation") of creditors in interest holders impaired under the Plan by distributing through direct mail to such creditors and interest holders the approved Disclosure Statement, Plan, Ballot and Notice of the

time within which such acceptances and rejections of the Plan must be filed.

4. As reflected in the Ballot Report under Local Bankruptcy Rule 3018 filed April 15, 1991, which is incorporated herein by this reference, the Plan was affirmatively accepted by Classes 1, 12, and 14. No Ballots were received for Classes 2, 3, 11, and 13. All of the Classes of claims of the Farmers Home Administration ("FmHA"), being Classes 4-10, voted to reject the Plan. At least one impaired class that does not include insiders accepted the Plan; the class of general unsecured creditors, Class 12, voted unanimously to accept the Plan.

5. The classification of claims in the Plan is based upon the substantial similarity of all claims in each such class, is reasonable, was arrived at in good faith, and was not made for the purposes of affecting the vote in any such class, or for any improper purpose.

6. The Plan does not violate the absolute priority rule.

7. The Solicitation was carried out in good faith, was made to all impaired creditors, and was carried on from March 20, 1991 to April 15, 1991.

8. Objections to confirmation of the Plan were to be filed on or before April 13, 1991. On April 15, 1991, FmHA filed its objection to the Debtor's Plan.

9. A Joint Pre-Trial Statement for Hearing on Confirmation of Debtor's Chapter 11 Plan was filed on May 16, 1991, by the Debtor, FmHA and Western Cotton Services Corp. ("Western Cotton"), which identified the issues in dispute. The parties stipulated that the Debtor's Plan met all of the requirements of 11 U.S.C. § 1129(a)(1)-(13) with the exception of sub-section (a)(3), (7) and (8). (See, Joint Pre-Trial Statement at ¶ 27).

10. Hearings were held on the Plan on April 18, 1991, July 30, 1991, October 16, 1991, January

3, 1992, March 10, 1992, July 22, 1992 and August 20, 1992, regarding confirmation of the Plan. During the confirmation hearings the Debtor and Western Cotton reached an agreement for treatment of Western Cotton's claim under the Plan. Western Cotton withdrew any objection to the Plan and voted for acceptance of the Plan. Therefore, the only remaining dispute before the Court is between the Debtor and FmHA.

11. Exhibit "A" to the Plan is deleted and the Substituted Exhibit "A", which is attached hereto and incorporated herein by reference, is herewith incorporated in the Plan, and shall govern the property to be transferred under the Plan to FmHA and Western Cotton. Any provision of the Plan inconsistent with Substituted Exhibit "A", including Article VII of the Plan, is herewith deleted to the extent inconsistent with Substituted Exhibit "A" and modified to conform with Substituted Exhibit "A".

12. After considering the evidence, objections and arguments presented, the Court finds as follows:

13. The gross value of the Debtor's real property to be distributed under the Plan is $7,300 per acre. For the purposes of the Debtor's Plan, with regard to FmHA, the gross value per acre must be adjusted by the costs that would be incurred by FmHA in selling the property which is ten percent (10%) of the per acre value or $730 per acre. The property to be transferred to FmHA under the Plan is accordingly herewith augmented by 53 acres as set forth in Substituted Exhibit "A".

14. (a) The Plan complies with all applicable provisions of the Bankruptcy Code and other relevant law;

(b) The Debtor complies with all other applicable provisions of Title 11 of the United States Code;

(c) Debtor's Plan has been proposed in good faith and not by any means forbidden by law;

(d) All payments to be made by Debtor or any other party as provided in Bankruptcy Code Section 1129(a)(4) for services or for costs and expenses in or in connection with the case either have been approved, or are subject to the approval, by this Court as reasonable;

(e) As required by Bankruptcy Code Section 1129(a)(5), Debtor has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the Plan, as director, officer, or voting trustee of the Debtor, and the appointment to, or continuance in, such office of such individuals is consistent with the interests of the creditors and equity security holders and with public policy; further, Debtor has disclosed the identity of any insider who will be employed or retained by the reorganized Debtor, and the nature of any compensation for such insider;

(f) Requirements of Section 1129(a)(6) are not applicable to the Plan;

(g) With respect to each impaired class of claims or interests, each holder of claim or interest of such class has either accepted the Plan or will receive or retain under the Plan as of the effective date, property of a value that is not less than the amount each claim or interest holder would receive or retain if Debtor were liquidated under Chapter 7 of the Bankruptcy Code;

(h) Each impaired class has either accepted the Plan or the treatment provided by the Plan for such class is fair and equitable and does not discriminate unfairly as to such class;

(i) With respect to those classes of secured claims, the Plan provides that each holder of a claim of such class will receive under the Plan on account of such claims property of a value, as of the effective date of the Plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims;

(j) All allowed administrative and priority claims under Sections 503 and 507(a)(1) of the Bankruptcy Code will be paid in cash in full under the Plan on the effective date, or when allowed by order of the Court;

(k) The Plan is feasible and is based on valid business judgments and reasonable estimates of future income. It is not likely to be followed by a liquidation or by a need for further financial reorganization;

(l) Requirements of Section 1129(a)(12) have been complied with by the Debtor;

(m) The Requirements of Section 1129(a)(13) are not applicable to this case;

(n) All modifications to the Plan do not adversely affect the treatment of claims, creditors or interest holders under the Plan within the meaning of Bankruptcy Rule 3019 or Section 1127 of the Bankruptcy Code, and adequate notice of such modifications has been given or is not required.

15. All applicable provisions of Section 1129 of the Bankruptcy Code have been satisfied by the Debtor.

16. The Court finds and concludes that the actions of the Debtor in submitting the Plan were performed in good faith.

17. At least one class of impaired creditors has accepted the Plan as required by 11 U.S.C. § 1129(a)(10), determined without including any acceptance of the Plan by any insider.

18. The Court finds and concludes that with respect to the classes of allowed secured claims, the Plan provides for the realization by the holders of such claims of the indubitable equivalent of such claims by the transfer to such holders of a portion of the Debtor's real property, which is the collateral securing such claims, of a value sufficient to satisfy such claims in full.

IT IS THEREFOR, ORDERED, ADJUDGED AND DECREED that the Debtor's Second Amended Plan as filed on January 8, 1991, and modified during the confirmation hearing as described hereinabove, is confirmed;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court shall retain jurisdiction as set forth in Article XI of the Plan;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all claims recoverable under Section 550 of the Bankruptcy Code, all claims against third parties on account of any indebtedness, and other claims owed to or in favor of the Debtor to the extent not specifically compromised or released pursuant to the Plan or an agreement referred to and incorporated therein, are preserved and retained for enforcement by the Debtor subsequent to the effective date;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Debtor is authorized and directed to enter into, execute, deliver, and implement the Plan which is incorporated herein by reference, and any and all documents, instruments, and modifications consistent therewith, and any amendments to such documents, instruments and modifications being approved hereby, and to take such other steps and perform such other acts, including execution of any other documents or agreements as may be necessary to implement and effectuate the Plan;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that additional contribution commitments, if any, are exempt from registration under the securities laws pursuant to Section 1145 of the Bankruptcy Code;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that pursuant to Section 1146(c) of the Bankruptcy Code, the issuance, transfer, exchange, or the revesting, transfer in sale of any real or personal property of Debtor in accordance with the Plan shall

not be taxed under any state or local law imposing a stamp tax, transfer tax or similar tax.

DATED this 5th day of May, 1993.

/s/ REDFIELD T. BAUM
REDFIELD T. BAUM
U.S. BANKRUPTCY COURT JUDGE

EXHIBITS DELETED

APPENDIX "B"

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	)	BAP No. AZ-93-1577-AsRMe
	)	
ARNOLD and BAKER FARMS,	)	BK. No. 86-1195-PHX-RTB
	)	
Debtor.	)	
	)	
UNITED STATES OF AMERICA, on Behalf the Farmers Home Administration,	)	
	)	
Appellant,	)	
	)	
v.	)	**O P I N I O N**
	)	
ARNOLD and BAKER FARMS and WESTERN COTTON SERVICES CORP.,	)	
	)	
Appellees.	)	

Argued and Submitted on
March 23, 1994 at Phoenix, Arizona

Filed - Dec 30 1994

Appeal from the United States Bankruptcy Court
fro the District of Arizona

Honorable Redfield T. Baum, Bankruptcy Judge,
Presiding

Before: ASHLAND, RUSSELL, and MEYERS, Bankruptcy Judges.

ASHLAND, Bankruptcy Judge:

The debtor's plan proposed a "dirt for debt" transfer to two lienholders encumbering the primary asset of the estate. The first position lien holder objected to the plan on the grounds that: (1) the plan erroneously estimated the value of the land to be exchanged; (2) the plan was not proposed in "good faith;" (3) the plan violated the "best interests of creditors" test; and (4) the plan was not "fair and equitable." The bankruptcy court confirmed the plan over the largest secured creditor's objections. We reverse the bankruptcy court's order confirming the plan.

STATEMENT OF FACTS

The debtor Arnold and Baker Farms is an Arizona general partnership. The partnership was formed in 12975 by Walter H. and Nancy E. Arnold, Maurice F. and Maurine H. Arnold, and Charles M. and Wanda J. Baker for the purpose of farming and the sale and lease of farmland. Arnold and Baker purchased 1120 acres from Philip and Dorothy Ladra in 1975 and an additional 320 acres in 1979. The Ladras were given a first deed of trust on the property. In 1977, the farm began to experience financial difficulties.

The Farmers Home Administration ("FmHA") and Western Cotton Services Corporation, a wholly owned subsidiary of the Anderson Clayton Company, financed certain crops for the years 1978 through 1981. Additionally, FmHA lent Arnold and Baker sufficient funds to make the annual payments on the installments due to the Ladras in the years 1979, 1980, and 1983. In return, FmHA held a second deed of trust on Arnold and Baker's real property, a perfected security interest in the farm equipment, and a first deed of trust on the Arnolds' personal residence. Western Cotton held a third deed of trust on Arnold and Baker's real property.

The Ladras ultimately instituted a judicial foreclosure proceeding against Arnold and Baker's real property. Subsequently, in April 1984, the Bakers individually filed a voluntary petition for

relief under Chapter 11 of the Bankruptcy Code. The Ladras obtained relief from the automatic stay and continued their judicial foreclosure proceedings. Arnold and Baker, the partnership, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in April 1986.

In May 1986, the bankruptcy court approved the sale of two pieces of real property free and clear of liens: 360 acres if real property to Cardon Oil Company and 480 acres to the entity known as the Corks. From net proceeds of the sale and the payment of annual installments, Arnold and Baker satisfied the secured claim of the Ladras in the amount of $1,650,000. FmHA thereafter held a first priority and Western Cotton held a second priority lien in the property.

Arnold and Baker subsequently formulated two plans based on the income generated from the Cardon and Cork sales which proposed to pay in full the allowed claims of all creditors. The First plan was withdrawn when the Corks defaulted on their note and the other, a revised plan, was withdrawn when Cardon Oil defaulted on its note. With respect to the Corks' default, Arnold and Baker negotiated a settlement pursuant to which the Corks tendered 360 acres to Arnold and Baker in lieu of foreclosure.[1] With respect to the Cardon default, Arnold and Baker ultimately purchased the 320 acre parcel at a nonjudicial foreclosure.[2]

In January 1991, Arnold and Baker filed a second amended plan and disclosure statement. The second amended plan proposed to pay FmHA's $3,837,618 note and Western Cotton's $565,044 note

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1 The original sale to the Corks involved 480 acres of real property. However, the return under the settlement only involved 360 acres. Presumably, the Corks obtained a release in order to retain the 120 acres.

2 The parties agree that the original sale to Cordon involved 360 acres and that 320 acres were bought upon foreclosure. There is no explanation as to the ownership of the 40 acres which were sold to Cordon and not foreclosed upon by Arnold and Baker.

in full. The plan proposed to transfer a proportionate fee simple interest in the 635 acre parcel of real property to FmHA and Western Cotton. FmHA was earmarked to receive 515 acres of real property and Western Cotton was earmarked to retain ownership of the 640 acres scheduled for distribution. Arnold and Baker proposed to sell the adjoining 360 acre parcel of real property in order to pa the administrative claims, Untied States Trustee's fees, attorney fees, accountant fees, postpetition taxes, the real estate commission due and owing to Walter Arnold, and use the remainder to pay the unsecured creditors. Arnold and Baker retained an interest in the property remaining after distribution and sale.

Both FmHA and Western Cotton initially objected to confirmation of Arnold and Baker's second amended plan. However, during the course of the confirmation hearing, Western Cotton reached a settlement with Arnold and Baker pursuant to which Western Cotton agreed to accept 130 acres of real property in full satisfaction of its debt. Western subsequently withdrew its objection to confirmation and voted to accept the plan.

For purposes of the confirmation hearing, the parties stipulated that the second amended plan met all the requirements of § 1129(a)(1-13) with the exception of subsections (a)(3), (7), and (8). Additionally, FmHA objected to being crammed down pursuant to § 1129(b)(2). The principal factual issue concentrated on the fair market value of Arnold and Baker's 1320 acres of land. Arnold and Baker estimated the per acre value to be $7,322 for the 640 acre lot, $8,300 for the 360 acre lot, and $8,631 for the 320 acre lot. FmHA estimated the per acre value for the entire 1320 acres at $1,381.

On May 5, 1993, the bankruptcy court confirmed the plan finding that the property had an estimated value of $7,300 per acre. However, the bankruptcy court modified the transfer to FmHA in the plan by ordering an additional 10% transfer to FmHA in order to compensate it for the costs associated with a sale.

On May 14, 1993, FmHA timely filed its notice of appeal, and on May 17, 1993, filed a motion for stay pending appeal. The bankruptcy court denied the motion for stay by minute order on September 30, 1993. FmHA then filed an emergency motion for stay pending appeal to the Bankruptcy Appellate Panel. On October 19, 1993, the panel granted the emergency motion for a stay of the plan confirmation order pending appeal.

STATEMENT OF THE ISSUES

Whether the bankruptcy court erred when estimating the per acre value of the real property.

Whether the second amended plan was proposed in "good faith" pursuant to § 1129(a)(3).

Whether the second amended plan satisfied the "best interests of creditors" test pursuant to § 1129(a)(7).

Whether the second amended plan treated the largest secured creditor's claim "fairly and equitably" pursuant to § 11 U.S.C. 1129(b)(1).

Whether the second amended plan provided the largest secured creditor with the "indubitable equivalent" of its claim pursuant to § 1129(b)(2)(A)(iii).

STANDARD OF REVIEW

A bankruptcy court's property valuation, the "good faith" determination, and "best interests of creditors" determination are all findings of fact. In re Tuma, 916 F.2d 488, 491 (9th Cir. 1990) (property value); In re Corey, 892 F.2d 829, 835 (9th Cir. 1989) (good faith); Kane v. Johns-Manville Corp., 843 F.2d 636, 649 (2d Cir. 1988) (best interests of creditors); In re Stolrow's Inc., 84 B.R. 167, 172 (9th Cir. BAP 1988) (good faith). We review findings of fact under a clearly erroneous standard. Federal Rule of Bankruptcy Procedure 8013. A finding of fact is clearly erroneous when after reviewing the evidence we are left with the definite and firm conviction that a mistake has been

committed. In re Contractors Equip. Supply Co., 861 F.2d 241, 243 (9th Cir. 1988).

The issue of "fair and equitable" treatment pursuant to § 1129(B) is a question of fact that we review under the clearly erroneous standard. In re Acequia, Inc., 787 F.2d 1352, 1358 (9th Cir. 1986); Citibank, N.A. v. Baer, 651 F.2d 1341, (10th Cir. 1980) (Bankruptcy Act Case); Stolrow's, 84 B.R. at 172. Whether a plan provides a secured creditor with the "indubitable equivalent" of its claim under § 1129(b)(2)(A)(iii) is a mixed question of law and fact. In re Pine Mountain, Ltd., 80 B.R. 171 (9th Cir. BAP 1987). "Although the facts underlying such a determination are reviewed under the clearly erroneous standard, the question of whether the legal standard has been satisfied is reviewed de novo." Pine Mountain, 80 B.R. at 172.

DISCUSSION

A. STANDARD OF PROOF

The debtor carries the burden of proving that a Chapter 11 plan complies with the statutory requirements for confirmation under §§ 1129(a) & (b). See, e.g., In re B.W. Alpha, Inc., 100 B.R. 831 (N.D. Tex. 1988); In re Rusty Jones, Inc., 110 B.R. 362 (Bankr. N.D. Ill. 1990). Although the parties agree with the preceding conclusion, they disagree with the characterization of the scope of the debtor's burden of proof. Arnold and Baker maintain that the burden of proof is by a preponderance of the evidence while FmHA maintains that it is by clear and convincing evidence.

Proof by the preponderance of the evidence means that it is sufficient to persuade the finder of fact that the proposition is more likely true than not. See, e.g., In re Winship, 397 U.S. 358, 371 (1970). Clear and convincing evidence is a higher standard requiring a high probability of success. See, e.g., Colorado v. New Mexico, 467 U.S. 310, 316 (1984).

Some courts have applied the clear and convincing standard to plan confirmation. See,

e.g., In re Briscoe Enters, Ltd., II, 138 B.R. 795, 804-05 (N.D. Tex 1992), rev'd, 994 F.2d 1160, 1163-1165 (5th Cir. 1993); In re Miami Ctr. Assocs., Ltd., 144 B.R. 937, 940 (Bankr. S.D. Fla. 1992). Other courts have applied the preponderance of the evidence standard. See, e.g., Aetna Realty Investors v. Monarch Beach Venture, Ltd. (In re Monarch Beach Venture, Ltd.), 166 B.R. 428, 431-32 (C.D. Cal. 1993); In re Woodstock Assoc's I, Inc., 120 B.R. 436 (Bankr. N.D. Ill. 1990); Rusty Jones, 110 B.R. at 373. One court applied the preponderance of the evidence standard to the requirements under § 1129(a) and the clear and convincing standard under the cram down provisions of § 1129(b). In re MCorp Fin., Inc., 137 B.R. 219, 225 (Bankr. S.D. Tex. 1992). We find the preponderance of the evidence to be the correct burden of proof in the context of plan confirmation.

The Supreme Court recently applied the preponderance of the evidence standard to nondischargeability proceedings under § 523(a). Grogan v. Garner, 498 U.S. 279, 285 n.11 (1991). Similarly, the Tenth Circuit applied the preponderance of the evidence standard to the general discharge under § 727. In re Serafini, 938 F.2d 1156, 1157 (10th Cir. 1991). Despite this apparent trend, the district court in Briscoe did not apply the Grogan and Serafini standard to plan confirmation. Briscoe, 138 B.R. at 804-05. The Briscoe court limited the holdings in those cases to the issue of dischargeability stating "[t]he clear and convincing test is the logical one to apply [in plan confirmation] because of the stricter scrutiny required when property and property rights are sought to be taken." Briscoe, 138 B.R. at 805 (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)). The Fifth Circuit reversed stating that the district court's analysis is too narrow a reading of Grogan:

> [B]oth § 1129 and the legislative history are silent as to the burden of proof. This case is solely about money. There are not even any quasi-liberty interests at stake. It is correct, of course, as Justice Brandeis noted during the

> depression in a case involving the significant alternation of farm mortgagees' rights, that the bankruptcy laws are subject to the Takings clause. The Code, however, has been the primary source of the creditors' protections not the Fifth Amendment. Congress provides protections for creditors, and in many instances allows debtors to impinge on creditor's state law rights.

Heartland Fed. Sav. and Loan Ass'n v. Briscoe Enters, Ltd. (In re Briscoe Enters., Ltd.), 994 F.2d 1160, 1165 (5th Cir. 1993) (footnote omitted), cert. denied, 114 S. Ct. 550 (1993) (referring to Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935)). The Fifth Circuit ultimately concluded that based upon legislative silence and the structure of the Code, preponderance of the evidence is the appropriate standard of proof under both § 1129(a) and in cram down under § 1129(b). Briscoe, 994 F.2d at 1165. We agree.

Although the holdings in Grogan and Serafini could arguably be limited in its application to creditors, we find no sufficient justification for imposing a heightened burden of proof on the debtor in plan confirmation. According, we follow the Fifth Circuit's analysis concluding that the preponderance of the evidence is the appropriate standard of proof in confirming a plan under §§ 1129(a) & (b).

B. PER ACRE PROPERTY VALUATION

1. The Highest and Best Use of the Land

The bankruptcy court found the highest and best use of the property was for land development. FmHA maintains that the "highest and best use" of the property is for an irrigated farm. The determination of the highest and best use of the property is a factual finding that will be upheld unless clearly erroneous. See, FRBP Rule 8013; Tuma, 916 F.2d at 491.

In the mid to late 1980s, property values in the Rainbow Valley area appreciated rapidly. The rapid appreciation was due in large part to the acquisition of thousands of acres of land by American Continental Corporation, a subsidiary of Lincoln Savings and Loan Association. However, in 1989 American filed for bankruptcy and Lincoln was taken over by the Federal Deposit Insurance Corporation. The Resolution Trust Corporation currently holds 19,000 acres that must be liquidated by December 31, 1996. See, 12 U.S.C. § 1441a(o). The rapid appreciation in property values due to the speculative development of the area transformed the "highest and best use" of the land into land held for investment. Although the RTC's substantial holdings in the Rainbow Valley area may have ultimately depreciated the market value of the property, this depreciation did not necessarily require a recharacterization of the highest and best use of the property. Accordingly, we find the bankruptcy court did not commit clear error in finding the highest and best use of the land.

2. Valuation under 11 U.S.C. § 506(a)

Arnold and Baker proposed to satisfy the FmHA claim by performing a partial "dirt for debt" transfer under the cram down provisions in § 1129(b)(2)(A)(iii). A dirt for debt transfer requires the debtor to transfer to a secured creditor the asset securing the original loan obligation. Conceivably, the transfer may be either a full transfer or a partial transfer of the collateral. See generally, In re Sandy Ridge Dev. Corp. ("Sandy Ridge I"), 881 F.2d 1346 (5th Cir. 1989), reh'd, en banc, denied, 889 F.2d 663 (5th Cir 1989). When a debtor proposes a partial transfer of collateral pursuant to a plan, it is essential for the bankruptcy court to estimate the value of the "dirt" in order to determine how much of the collateral will ultimately be transferred to the creditor in satisfaction of the debt.

Section 506(a) permits a bankruptcy court to establish the value of property in a bankruptcy case. The first sentence of § 506(a) requires the bankruptcy court to bifurcate a claim into separate

and independent secured claim and unsecured claim components. In re Case, 115 B.R. 666, 670 (9th Cir. BAP 1990). The second sentence of § 506(a) expresses the guidance provided by the Bankruptcy Code with respect to the valuation of the property subject to a lien or setoff. See, 3 Lawrence P. King, Collier on Bankruptcy, ¶ 506.04[2] at 506-25 (15th ed. 1993). The second sentence of § 506(a) provides:

> Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditors interest.

11 U.S.C. § 506(a).

The legislative history from the House and Senate Reports provides guidance in formulating two general propositions for valuations under § 506(a). First, a bankruptcy court should determine value under § 506(a) on a case-by-case basis. See, S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5854; H.R. Rep. No. 595, 95th Cong. 1st Sess. 356 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6312. The House Report provides:

> "Value" does not necessarily contemplate forced sale or liquidation value of the collateral; nor does it always imply a full going concern value. Courts will have to determine value on a case-by-case basis, taking into account the facts of each case and the competing interests in the case.

H.R. Rep. No. 595, 95th Cong. 1st Sess. 356 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6312. Second, a valuation under § 506(a) should be made in light of the Code section that is relevant at the time the valuation is made. See, S. Rep. No. 989, 95th Cong., 2d Sess. 68 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5854; H.R. Rep. No. 595, 95th

Cong. 1st Sess. 356 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6312. For example, a bankruptcy court may approach a valuation in the context of a relief from the stay hearing under § 362 differently than it would in the context of "cram down" under § 1129(B). See, In re Sherman, 157 B.R. 987, 991 (Bankr. E.D. Tex. 1993); Case, 115 B.R. at 670.

The valuation in this case was performed in light of confirmation of a plan pursuant to § 1129. The Arnold and Baker plan proposed to transfer 515 acres to FmHA and 130 acres to Western Cotton in full satisfaction of their debts. The distribution was premised on an appraisal estimating the 640 acre parcel to be worth $7,322 per acre. FmHA's appraisal, on the other hand, estimated the land to be worth $1,381 per acre. Both appraisals used the market data approach to estimate the value of the land. The market data approach compares the subject property to similar properties that were recently sold in the same or general area.

The comparison properties in Arnold and Baker's appraisal included 5 properties sold in 1987, 3 properties sold in 1988 and one property sold in 1989.[3] Based upon this data, Arnold and Baker estimated the property would bring $10,500 per acre in a normal market. Arnold and Baker found the market abnormal because the RTC was holding 19,000 acres for liquidation.[4] Arnold and Baker further

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3 FmHA determined that the highest and best use of the property was for farmland. The bankruptcy court found the highest and best use of the property to be for land investment. FmHA's appraisal only used farmland property as comparison data. Accordingly, we will not discuss the comparison properties found in the FmHA appraisal.

4 The Arnold and Baker appraisal stated:
In my opinion, had the area not experienced some problems due to the problems of America Continental Corporation and Lincoln Savings, the subject would tend to have a per acre value of about $10,500. The problems this area has been experiencing appear to be nearing an end and therefore the area could expect to continue with its growth in the near future. The landholdings of Lincoln Savings would need to be acquired by a strong developer who would continue on with the development of Estrella.

reduced the per acre valuation to $7,322 based upon future work that needed to be performed on the land.

The bankruptcy court agreed with Arnold and Baker's appraisal finding the property to be worth $7,300 per acre. However, the bankruptcy court modified the transfer to FmHA by transferring an additional 10% to FmHA in order to compensate for the costs associated with the sale. FmHA maintains that the bankruptcy court erred by adopting Arnold and Baker's appraisal because the appraisal ignores the current market conditions by assessing the property value two years into the future and then applying a 15% discount rate to determine the present value.

The bankruptcy courts that have performed valuations in circumstances similar to the instant case have recognized essentially three valuation procedures: (1) liquidation value; (2) market value; and (3) fair value. The bankruptcy court in In re Simons, 113 B.R. 942 (Bankr. W.D. Tex. 1990), applied a liquidation valuation where the plan proposed to return real property to a secured creditor. Simons, 113 B.R. at 948.

Two bankruptcy courts have applied the "market value" valuation. In re Stockbridge Properties I, Ltd., 141 B.R. 469, 471-72 (Bankr. N.D. Ga. 1992); In re El Paso Truck Ctr., Inc., 129 B.R. 109, 111-12 (Bankr. W.D. Tex. 1991). Market value may appropriately be defined as "[t]he most probable price which a property should bring in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably and assuming the price is not affected by undue stimulus." Stockbridge, 141 B.R. at 470 n.1, citing, 12 CFR § 1608.2(f)

If the market were more normal, we could expect the typical marketing period, for a property such as the subject, to be approximately one year in achieving a selling price at its estimated value. In my opinion, the problems of the area have extended the marketing period approximately two years and therefore we should discount the $10,500 for two years. In my opinion, a reasonable discount rate would be 15 percent. This would indicate a value for the subject to day at $7,900 per acre.

(1994). In Stockbridge, the bankruptcy court first determined the fair market value of the property and then reduced that value by deducting the costs associated with maintaining and marketing the property over a three year period. Stockbridge, 141 B.R. at 471-72. A three year period was selected because the court determined that it would take the secured creditor at least three years to sell the property.

Valuation through the "fair value" method essentially applies a market valuation and then discounts that value to present value in order to reflect the amount of time the property is scheduled to be held by the creditor in anticipation of sale. On bankruptcy court defined "fair value" by looking to Statement #15 of the Financial Accounting Standards Board ("FASB"):

> Fair value of assets shall be measured by their fair market value if an active market for them exists. If no active market exists for the assets transferred but exists for similar assets, the selling prices in that market may be helpful in estimating the fair value of the assets transferred. If no market price is available, a forecast of expected cash flows may aid in estimating the fair value of assets transferred, provided the expected cash flows are discounted at a rate commensurate with the risk involved.

First American Bank v. Monica Rd. Assoc. (In re Monica Rd. Assocs.), 147 B.R. 385, 393 (Bankr. E.D. Va. 1992). The Monica Rd. court found the discount rate to be an important feature of the "fair value" valuation method when a current sale is not expected. See, Monica Rd., 147 B.R. at 393.

The bankruptcy court in this case essentially applied a "fair value" valuation method. Arnold and Baker's appraiser determined that the property was worth $10,500 per acre. However, the appraiser found the property needed to be held for two years in order to obtain that price at sale. Arnold and

Baker accounted for the holding period by applying a 15% discount rate that reduced the Property's per acre valuation up to $7,322. The bankruptcy court subsequently determined the property to have a value of $7,300 per acre and then reduced that value by 10% to reflect the eventual costs associated with selling the property. FmHA was ultimately scheduled to receive 566.5 acres in satisfaction of its debt.

The "fair value" method of valuation is an acceptable valuation procedure. The method balances the interests of the debtor, by avoiding a liquidation valuation when there is no current market for the property, with the interests of a creditor, by realizing a present value for the property when the experts agree that the property is not marketable until two or three years into the future. See, H.R. Rep. No. 595, 95th Cong. 1st Sess. 356 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6312 ("'Value' does not necessarily contemplate forced sale or liquidation value of the collateral; nor does it always imply a full going concern value."). A discount rate is appropriate because it attempts to value the collateral as though it were in the hands of the creditor. See, In re Mitchell, 954 F.2d 554, 559 (9th Cir. 1992), cert. denied, 113 S. Ct. 303 (1992)[5]; see also, Monica Rd., 147 B.R. at 392.

Although we are troubled by the fact that the accepted appraisal ignored the effect on the market of the 19,000 acres held by the RTC, we nevertheless find that the bankruptcy court valued the property in light of the purpose of the valuation and the disposition of the property under the terms of the plan. See, 11 U.S.C. § 506(a). Furthermore, FmHA has not met its burden of proof establishing that the bankruptcy court's determination was clearly

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5 In Mitchell, the court found the value of an automobile under § 506(a) is measured by its wholesale value. Mitchell, 954 F.2d at 560. The Mitchell court looked to the language in § 506(a) requiring the valuation to be made "in light of the disposition or use of such property" and ultimately determined that the property should be valued as though it were in the hands of the creditor. See, Mitchell, 954 F.2d at 560.

erroneous. FmHA provided a very incomplete transcript from the valuation hearings and FmHA's attorney admitted at oral argument that the bankruptcy court's determination was not clearly erroneous.

C. PLAN CONFIRMATION

For purposes of the confirmation hearing, the parties stipulated that the seconded amended plan met all the requirements of§ 1129(a)(1-13) with the exception of subsections (a)(3), (7), and (8). Additionally, FmHA objected to being crammed down under § 1129(b). FmHA maintains that the bankruptcy court erred in confirming the plan because the plan was not proposed in good faith, did not satisfy the best interests of creditors test, and did not satisfy the fair and equitable requirements.

1. Good faith

Section 1129(a)(3) states that the bankruptcy court shall confirm a plan if the plan has been proposed in good faith and not by any means forbidden by law. The good faith that is required to confirm a plan requires the plan to achieve a result consistent with the objectives and purposes of the Bankruptcy Code. In re Mann Farms Inc., 917 F.2d 1210, 1214 (9th Cir. 1990); In re Corey, 892 F.2d 829, 835 (9th Cir. 1989), cert. denied, 498 U.S. 815 (1990); Pacific First Bank ex rel. RT Capital Corp. v. Boulders on the River (In re Boulders on the River), 164 B.R. 99, 103 (9th Cir. BAP 1994). The Bankruptcy court found that Arnold and Baker's plan was proposed in good faith. Although ultimately some aspects of the plan may not comply with the Bankruptcy Code, the bankruptcy court's finding that the plan was proposed in good faith was not clearly erroneous. There was a reasonable likelihood that Arnold and Baker's plan complied with the objectives and purposes of the Bankruptcy Code. See, In re Elm Creek Joint Venture, 93 B.R. 105, 109 (Bankr. W.D. Tex. 1988).

2. Best Interests of Creditors Test

FmHA maintains that the plan did not contain a liquidation analysis pursuant to § 1129(a)(7), and therefore is not confirmable. Section 1129(a)(7) incorporates the former "best interests of creditors" test as found in the Bankruptcy Act. See, In re M. Long Arabians, 103 B.R. 211, 217 (9th Cir. BAP 1989). Section 1129(a)(7) provides:

> (a) The court shall confirm a plan only if all of the following requirements are met:
>
> . . . .
>
> (7) With respect to each impaired class of claims or interests--
>
> (A) each holder of a claim or interest of such class--
>
> (i) has accepted the plan; or
>
> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date; . . . .

11 U.S.C. § 1129(a)(7).

Arnold and Baker maintain that this issue is not reviewable because FmHA raises this argument for the first time on appeal. It is a general rule that appellate courts will not consider arguments raised for the first time on appeal. Abex Corp. v. Ski's Enter., Inc., 748 F.2d 513, 516 (9th Cir. 1984). The application of this rule is discretionary. Singleton v. Wulff, 428 U.S. 106 (1976); Abex, 748 F.2d at 516. "It is well settled in this circuit that where the new issue is purely a legal one, the injection of which would not have caused the parties

to develop new or different facts, we may resolve it on appeal." Abex, 748 F.2d at 514 (quoting United States v. Dann, 706 F.2d 919, 925 n. 5 (9th Cir. 1983), cert. granted, 467 U.S. 1214 (1984)).

Section 1129(a) states that the court shall confirm a plan only if all of the requirements are met. Whether or not the plan in this case included a liquidation analysis is a legal question. See, In re Bonner Mall Partnership, 2 F.3d 899, 905 (9th Cir. 1993), cert. granted, 114 S.Ct. 681 (1994) (stating that all thirteen requirements for confirmation under § 1129(a) must generally be satisfied). Accordingly, we will review this question on appeal.

Arnold and Baker maintain that a liquidation analysis is not necessary because the plan paid FmHA's claim in full and therefore FmHA cannot receive less then it would in a Chapter 7 distribution. We agree. FmHA's original valuation, which was essentially a liquidation valuation, estimated the per acre value for the entire 1320 acres at $1,381 per acre. The Arnold and Baker plan, on the other hand, proposed to distribute land to FmHA assessed at $7,300 per acre. Although Arnold and Baker should have included a liquidation analysis in the plan and disclosure statement, the evidence establishes that FmHA will receive at least as much as it would have in a Chapter 7. See, Elm Creek Joint Venture, 93 B.R. at 109.

3. Cram Down

When proposing a plan, the debtor places the administrative claimants, the creditors, and the equity holders into classes based upon the similarity of their claims or interests. See, 11 U.S.C. § 1122. A bankruptcy court shall confirm the plan "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." See, 11 U.S.C. § 1129(b)(1); Bonner Mall, 2 F.3d at 906. This form of plan confirmation is colloquially referred to as "cram down." Bonner Mall, 2 F.3d at 906. FmHA does not argue that Arnold and Baker's

plan discriminates unfairly.[6] As a result, our discussion will focus on the "fair and equitable" standard.

Section 1129(b)(2)(A) identifies three explicit requirements of the fair and equitable standard with respect to a secured class. Section 1129(b)(2)(A) provides:

> (2) For the purposes of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:
>
> (A) With respect to a class of secured claims, the plan provides--
>
> (i)(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and
>
> (II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

---

6 Although we do not take this opportunity to discuss unfair discrimination, there is evidence that Arnold and Baker may have discriminately unfairly when it settled with Western Cotton. Western Cotton was owed $565,044 and FmHA was owed $3,837,618. The plan proposed to distribute 77 acres to Western Cotton and 515 acres to FmHA @ $7,322 per acre in full satisfaction of their debts. Both FmHA and Western Cotton objected to confirmation. Arnold and Baker ultimately settled with Western Cotton by increasing their distribution to 130 acres. As a result, Western Cotton received $951,860 in land for a debt valued at $565,044.

> (ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or
>
> (iii) for the realization by such holder of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A)(i)-(iii).

4. Providing the indubitable equivalent of the secured claim

The plan approved by the bankruptcy court proposed to transfer 566.5 acres to FmHA in full satisfaction of its liens. This type of transaction is colloquially referred to as a "dirt for debt" distribution. Arnold and Baker maintain the plan provided FmHA with the indubitable equivalent of its secured claim by transferring a portion of Arnold and Baker's real property. FmHA maintains that it did not receive the indubitable equivalent of its claim because the partial distribution transferred the risk of sale to FmHA. In other words, if FmHA subsequently sells the property for less than the bankruptcy court's valuation, FmHA has no recourse for the deficiency because FmHA does not retain a security interest in the property retained by Arnold and Baker.

We must first decide whether the partial transfer of a secured creditor's collateral in satisfaction of its entire secured claim may be the indubitable equivalent of the original secured claim pursuant to § 1129(b)(2)(A)(iii). If we answer this question in the affirmative, we must then decide under what circumstances such a partial transfer will provide the indubitable equivalence.

The Fifth Circuit's opinion in Sandy Ridge I is regarded by many bankruptcy courts as the seminal case with respect to "dirt for debt" distributions.

See, e.g., In re Pennave Properties Assoc., 165 B.R. 793, 795 (E.D. Pa. 1994); In re Wermelskirchen, 163 B.R. 793, 795 (E.D. Ohio 1994); In re Martindale, 1325 B.R. 32, 38 N.5 (Bankr. D. Idaho 1991); In re Simons, 113 B.R. at 946-47. The Sandy Ridge I court held:

> [T]he transfer on plan approval of all its collateral to a secured creditor, at a value property fixed by the bankruptcy court, gives that creditor the indubitable equivalent of its secured claim.

Sandy Ridge (Sandy Ridge I), 881 F.2d at 1354. FmHA maintains that Sandy Ridge I is distinguishable from the facts in this case. We agree.

First, when denying the petition for rehearing, the Sandy Ridge II court limited the scope of its prior opinion and therefore its persuasive influence. See, In re Sandy Ridge Devel. Corp. ("Sandy Ridge II"), 889 F.2d 663 (5th Cir. 1989); Martindale, 125 B.R. at 38 n.5 (limiting Sandy Ridge I to its facts). The Sandy Ridge II court stated:

> In denying the petition for rehearing . . . we have held that distribution of estate property . . . is not per se categorically prohibited as a matter of law under Chapter 11 of the Bankruptcy Code and the plan in question meets the requirements of 11 U.S.C. § 1129(b)(2)(A)(iii). . . . However, these holdings do not mean, and we have not held, that the plan in question meets (or fails to meet) the "fair and equitable" requirement (or the "does not discriminate unfairly" requirement) of section 1129 (b)(1). . . . These matters are among those to be addressed by the bankruptcy court on remand.

Sandy Ridge (Sandy Ridge II), 889 F.2d at 663-64 (emphasis added).

Second, Sandy Ridge I permitted the transfer of all of the secured creditor's collateral. The secured creditor in Sandy Ridge I was undersecured. The bankruptcy court determined the secured claim and the debtor proposed to give all of the secured collateral to the creditor in satisfaction of its secured lien. Sandy Ridge (Sandy Ridge I), 881 F.2d at 1354. The creditor was then able to pursue the guarantors for the remaining unsecured claim. The Arnold and Baker plan, on the other hand, does not propose to transfer all 13209 acres of FmHA's collateral in satisfaction of the entire claim, but rather 566.5 acres or approximately 43% of FmHA's collateral.

It is apparent that a secured creditor who receives all of its collateral in satisfaction of its claim has received the indubitable equivalent of its secured claim. See, 124 Cong. Rec. H11104 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards) (abandonment of the collateral to the creditor would clearly satisfy indubitable equivalence).

However, where the creditor is earmarked to receive part of its collateral, it will be a rare case in which the creditor will have received the indubitable equivalent of its claim. Any such plan will be subject to extremely close scrutiny to insure that the creditor will actually receive the indubitable equivalent of its secured claim.

The legislative history to § 1129(b)(2)(A)(iii) clearly indicates that Congress intended the phrase "indubitable equivalent" to take on the meaning given it by Judge Learned Hand in In re Murel Holding Co., 75 F.2d 941, 942 (2d Cir. 1935). See, H.R. Rep. no. 595, 95th Cong. 1st Sess. 414-415, reprinted in 1978 U.S.C.C.A.N. 5787, 6370-6371; S.Rep. No. 989, 9th Cong., 2d Sess. 127, reprinted in 1978 U.S.C.C.A.N. 5787, 5913. Judge Hand, in Murel, explained the concept of adequate protection as follows:

> It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally

> the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no reason to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence.

Murel, 75 F.2d at 942. The Supreme Court analyzed the meaning of "indubitable equivalence" finding that "Murel used the words 'indubitable equivalence' with specific reference not to interests (which was assured), but to the jeopardized principal of the loan." United Sav. Ass'n v. Timbers of Inwood Forest, Ltd., 484 U.S. 365, 378 (1988) (emphasis added). Similarly, the Ninth Circuit interpreted "indubitable equivalence" in Murel to mean a substitute that "must both compensate for present value and insure the safety of the principal." In re American Mariner Indus., Inc., 734 F.2d 426, 433-34 (9th Cir. 1984), abrogated on other grounds, United Sav. Ass'n v. Timbers of Inwood Forest, 484 U.S. 365 (1988) (emphasis added).

The finding of a trial court of a particular value of real property for the purpose of § 506 will not necessarily determine whether the creditor will receive the indubitable equivalent of its secured claim. Experience has taught us that determining the value of real property at any given time is not an exact science. Because each parcel of real property is unique, the precise value of land is difficult, if not impossible, to determine until it is actually sold. Nevertheless, bankruptcy courts have traditionally been requested, out of necessity, to determine the value of various types of property, including real property, and yet courts have recognized the difficulty of being able to determine accurately the value of land. For instance, in In re Walat Farms, Inc., 70 B.R. 330 (Bankr. E.D. Mich. 1987), the court stated:

> Similarly, we concede to doubts about our ability to fix the "value" of the land in question. We need not make a pronouncement that no plan proposing the surrender of a portion of mortgaged land to a mortgagee in return for a compelled release of the lien on the remainder of the property will ever be confirmed. Suffice it to say, however, that no matter how hot the market for real estate may become in the future, the market for farm real estate here and now is not such which would permit us to hold that the value of the land being offered is the indubitable equivalent of Equitable's claim. "Indubitable" means "too evident to be doubted." Webster's Ninth New Collegiate Dictionary (1985). We profess doubt on the facts of this case.

Walat Farms, 70 B.R. at 334 (footnote omitted).

Similarly, in Martindale the court noted:

> Put another way, the preponderance of the evidence in the form of the appraisers' testimony may demonstrate a property value at a certain dollar amount. However, because of the imprecision inherent in this kind of proof, the dollar value shown may not necessarily constitute the indubitable equivalent of a cash payment tot he creditor in a like amount. See, e.g., Sandy Ridge, 77 B.R. at 73 ("If reasonable people can differ on the valuation of property, the valuation might by proved by a preponderance of the evidence but the conclusion would not be 'indubitable.'").

Martindale, 125 B.R. at 39.

Thus, the determination of whether a dirt for debt distribution provides a secured creditor with the indubitable equivalent of its secured claim must be made on a case-by-case basis, and we must decide

whether the bankruptcy court's finding with respect to the value of the real property for the purpose of determining the amount of the creditor's secured claim provided the secured creditor with the indubitable equivalent of its claim. In addition, we conclude that in order for a partial distribution to constitute the most "indubitable equivalence," the partial distribution must insure the safety of or prevent jeopardy to the principal.

Although we conclude that the bankruptcy court's valuation in this case is not clearly erroneous, we are not convinced that its finding regarding the value of the real property provided the indubitable equivalence of the particular secured claim in question, nor are we convinced that he partial distribution of 566.5 acres to FmHA will insure the safety of or prevent jeopardy to the principal. See, In re Pine Mountain, Ltd., 80 B.R. 171, 172 (9th Cir. BAP 1987) (facts underlying the "indubitable equivalence" determination are reviewed under the clearly erroneous standard; however, the question of whether the legal standard has been satisfied is reviewed independently).

The evidence at trial demonstrated that the value of the real property was far from certain. The Arnold and Baker appraisal admitted that due to unfavorable market conditions, including the fact that he RTC was holding 19,000 acres in the same area for liquidation, the normal one year marketing period for the property would be extended by another two years.

The bankruptcy court agreed with Arnold and Baker's valuation of $7,300 per acre. FmHA, however, proffered a valuation of $1,381 per acre. The large disparity in the parties' valuation of the same property illustrates the obvious uncertainty in attempting to forecast the price at which real property will sell at some uncertain future date.

The bankruptcy court found the value of each acre to be $7,300, and thus the value of the 566.5 acres to be transferred to FmHA to be $4,135,450 ($7,300 x 566.5). We must decide, therefore, whether a distribution of land with an estimated

value of $4,135,450 constitutes the indubitable equivalent of a $3,837,618 claim secured by 1,320 acres. Under the circumstances of this case, we conclude that it does not.

The partial distribution of 566.5 acres to FmHA will not insure the safety of or prevent jeopardy to the principal. FmHA originally lent funds to Arnold and Baker secured by 1320 acres of land. If Arnold and Baker defaulted on the term of the note, FmHA bargained for the right to foreclose on the entire 1320 acres of land in order to satisfy the outstanding obligation. In this situation, the principal is protected to the extent of the entire 1320 acres held as security. However, when there is a partial distribution of the collateral to a secured creditor in satisfaction of its secured claim, the substitute does not insure the safety of or prevent jeopardy to the principal.

If FmHA subsequently sells the property for less than the value calculated by the bankruptcy court, FmHA has no recourse to the remaining collateral to satisfy the deficiency. AS a result, the distribution to FmHA may not be "completely compensatory." See, Murel Holding, 75 F.2d at 942. FmHA is forced to assume the risk of receiving less on the sale without being able to look to the remaining undistributed collateral for security. "To the extent a debtor seeks to alter the collateral securing the creditor's loan, providing the 'indubitable equivalent' requires that the substitute collateral not increase the creditor's risk exposure." In re Keller, 157 B.R. 680, 683-84 (Bankr. E.D. Wash. 1993); see also, Monarch Beach, 166 B.R. at 436 (fair and equitable prohibits a plan form unfairly shifting risk of plan failure to the creditor).

The determination of whether a partial dirt for debt distribution will provide the creditor with the indubitable equivalence of its secured claim must be made on a case-by-case basis. Such a determination must be subject to extremely close scrutiny. For instance, such a case may exist where the parties generally agree upon the value of the land but for some reason an immediate sale of the

property is not practical. In such a situation, the secured creditor's rights may be fully protected by the payment of appropriate interests payments for a reasonable period of time. The real issue in such a case is not indubitable equivalency but rather feasibility.

For example, in In re Fursman Ranch, 38 B.R. 907 (Bankr. W.D. Mo. 1984), the plan provided for a portion of the property in which the creditor held a security interest to be conveyed to the creditor, while the debtor retained the remainder of the real property to be paid for under the plan in cash payments, subject to the lien of the secured creditor. The court noted that indubitable equivalency was not the real question but, rather, that he issue was feasibility. "Here the creditors concede that the value of the assets exceed the claims against them. The real issue to creditors if feasibility." Fursman Ranch, 38 B.R. at 909. The court further found that the plan also provided additional protection for the secured creditor. "There is an additional safeguard here because this is an ongoing case. If a commercially reasonable sale by the creditors does not result in payment approximating the values set here, the creditors may ask for reconsideration of their claims." Fursman Ranch, 38 B.R. at 910.

CONCLUSION

We hold that the Arnold and Baker plan, which proposes to transfer 566.5 acres or 43% of FmHA's collateral to FmHA in full satisfaction of its secured claim, does not provide FmHA with the indubitable equivalent of its secured claim. Accordingly, we reverse the bankruptcy court's order confirming the plan.

APPENDIX "C"

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	)	BAP No. AZ-93-1577-AsRMe
	)	
ARNOLD and BAKER FARMS,	)	BK. No. 86-1195-PHX-RTB
	)	
Debtor.	)	
	)	
UNITED STATES OF AMERICA, on Behalf the Farmers Home Administration,	)	
	)	
Appellant,	)	
	)	
v.	)	O R D E R
	)	
ARNOLD and BAKER FARMS and WESTERN COTTON SERVICES CORP.,	)	
	)	
Appellees.	)	

Before: ASHLAND, RUSSELL, and MEYERS, Bankruptcy Judges.

The panel's Opinion filed on December 30, 1994 is hereby amended by deleting on page 20, lines 20-21, the sentence "Whether or not the plan in this case included a liquidation analysis is a legal question." An Amended Opinion retaining the original file date of December 30, 1994 is filed simultaneously with this order.

The Amended Opinion doe snot alter, and shall have no affect on, the judgment filed in this appeal on December 30, 1994.

The Clerk shall serve on the parties a copy of the caption cover page and page 20 of the Amended Opinion, together with a copy of this order.

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re	)	BAP No. AZ-93-1577-AsRMe
	)	
ARNOLD and BAKER FARMS,	)	BK. No. 86-1195-PHX-RTB
	)	
Debtor.	)	
	)	
UNITED STATES OF AMERICA, on Behalf the Farmers Home Administration,	)	
	)	
Appellant,	)	
	)	**AMENDED OPINION**
v.	)	
	)	
ARNOLD and BAKER FARMS and WESTERN COTTON SERVICES CORP.,	)	
	)	
Appellees.	)	

Argued and Submitted on
March 23, 1994 at Phoenix, Arizona

Filed - Dec 30 1994

Appeal from the United States Bankruptcy Court
fro the District of Arizona

Honorable Redfield T. Baum, Bankruptcy Judge,
Presiding

Before: ASHLAND, RUSSELL, and MEYERS, Bankruptcy Judges.

> (ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under Chapter 7 of this title on such date;. . . .

11 U.S.C. § 1129(a)(7).

Arnold and Baker maintain that this issue is not reviewable because FmHA raises this argument for the first time on appeal. It is a general rule that appellate courts will not consider arguments raised for the first time on appeal. Abex Corp. v. Ski's Enter., Inc., 748 F.2d 513, 516 (9th Cir. 1984). The application of this rule is discretionary. Singleton v. Wulff, 428 U.S. 106 (1976); Abex, 748 F.2d at 516. "It is well settled in this circuit that where the new issue is purely a legal one, the injection of which would not have caused the parties to develop new or different facts, we may resolve it on appeal." Abex, 748 F.2d at 514 (quoting United States v. Dann, 706 F.2d 919, 925 n. 5 (9th Cir. 1983), cert. granted, 467 U.S. 1214 (1984)).

Section 1129(a) states that the court shall confirm a plan only if all of the requirements are met. See, In re Bonner Mall Partnership, 2 F.3d 899, 905 (9th Cir. 1993), cert. granted, 114 S.Ct. 681 (1994) (stating that all thirteen requirements for confirmation under § 1129(a) must generally be satisfied). Accordingly, we will review this question on appeal.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In Re: ARNOLD & BAKER FARMS, *Debtor.* ARNOLD & BAKER FARMS, *Appellant,* v. UNITED STATES OF AMERICA, on behalf of the United States Farmers Home Administration, *Appellee.*	No. 95-15305 BAP No. AZ-93-01577-AsRMe OPINION
In Re: ARNOLD & BAKER FARMS, *Debtor.* ARNOLD & BAKER FARMS, and WESTERN COTTON SERVICES CORP., *Appellants,* v. UNITED STATES OF AMERICA, on behalf of the United States Farmers Home Administration, *Appellee.*	No. 95-15309 BAP No. AZ-93-01577-AsRMe

In Re: ARNOLD & BAKER FARMS,
Debtor.

ARNOLD & BAKER FARMS,
Appellant,

v.

UNITED STATES OF AMERICA, on behalf of the United States Farmers Home Administration, WESTERN COTTON SERVICES CORP.,
Appellees.

No. 95-15701

BAP No.
AZ-93-01577-AsRMe

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Ashland, Russell, and Meyers, Judges, Presiding

Argued and Submitted
April 8, 1996—San Francisco, California

Filed June 7, 1996

Before: William A. Norris and Charles Wiggins,
Circuit Judges, and Howard D. McKibben.* District Judge.

Opinion by Judge Norris

*Honorable Howard D. McKibben, United States District Judge, District of Nevada, sitting by designation.

SUMMARY

Bankruptcy/Creditors and Creditors Committees/ Corporate Reorganization (Chapter 11)

The court of appeals affirmed a judgment of the Ninth Circuit Bankruptcy Appellate Panel (BAP). The court held that a particular bankruptcy reorganization plan's proposal to transfer to a creditor a portion of the collateral securing its claim would not provide that creditor with the "indubitable equivalent" of its secured claim, as required by the Bankruptcy Code's "cram down" provision.

Appellant Arnold & Baker Farms petitioned for bankruptcy relief under Chapter 11 and filed a plan of reorganization that proposed to satisfy the claims of creditors by transferring real property to them. Arnold & Baker's largest creditor, the Farmers Home Administration (FmHA), objected to the plan. Arnold and Baker invoked the cram down provision, which provides that the court, on request of the plan's proponent, shall confirm the plan notwithstanding an objection by an impaired creditor "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan."

The bankruptcy court confirmed the plan, finding that the property had an estimated value of $7,300 per acre. The bankruptcy court modified the transfer to FmHA in the plan by ordering an additional transfer to FmHA in order to compensate it for costs associated with a sale. The BAP reversed the order confirming the plan. Arnold and Baker appealed. Appellant Western Cotton Services Corp. also appealed, contending that the BAP lacked jurisdiction to consider the appeal from the bankruptcy court insofar as the appeal related to a transfer of acres to Western Cotton, because the transfer was carried out before the FmHA obtained a stay of the order confirming the plan.

[1] The case presented neither of the situations in which a dismissal for mootness is warranted. Only a single transaction was carried out. [2] In addition, both Arnold and Baker and Western Cotton were parties to the appeal. The bankruptcy court could fashion effective relief. Therefore, the appeal was not moot as to Western Cotton.

[3] To be "fair and equitable" for purposes of the cram down provision, a plan must satisfy, with respect to secured claims, one of three tests. One test is that the creditor is to realize the indubitable equivalent of its secured claim. [4] The bankruptcy court concluded that receipt of certain acres at $7,300 per acre would provide for FmHA to realize the indubitable equivalent of its secured claim. [5] The ultimate conclusion of indubitable equivalents is a question of law to be reviewed de novo. [6] The BAP was correct in stating that a trial court's finding of a particular value of real property will not necessarily determine whether the creditor will receive the indubitable equivalent of its secured claim. [7] The relevant section of the cram down provision does not require that a creditor receive the indubitable equivalent of its entire claim, but only of its secured claim. [8] In this case, the amount of collateral deemed to be the indubitable equivalent of FmHA's secured claim depended entirely on the court's valuation of the collateral. [9] The Arnold and Baker plan did not provide FmHA with the indubitable equivalent of its secured claim as required by the Code.

COUNSEL

Don A. Beskrone, Davis & Lowe, Phoenix, Arizona, for appellant Arnold & Baker Farms.

Jon S. Musial, Snell & Wilmer, Phoenix, Arizona, for appellant Western Cotton Services Corporation.

Richard G. Patrick, Assistant United States Attorney, Phoenix, Arizona, for the appellee.

OPINION

NORRIS, Circuit Judge:

Debtor Arnold and Baker Farms petitioned for relief under Chapter 11 and filed a plan of reorganization which proposed to satisfy the claims of the creditors by transferring real property to them — colloquially known as a "dirt for debt" plan. When Arnold and Baker's largest creditor, the Farmers Home Administration (FmHA), objected to the plan, Arnold and Baker invoked the "cram down" provision of the Bankruptcy Code. 11 U.S.C. § 1129(b). The question presented is whether the plan's proposal to transfer to FmHA a portion of the collateral securing FmHA's claim will provide FmHA with the "indubitable equivalent" of its secured claim, as required by the "cram down" provision. *See* 11 U.S.C. § 1129(b)(2)(A)(iii).

I

We adopt and quote verbatim the statement of facts set forth by the Bankruptcy Appellate Panel at *United States v. Arnold and Baker Farms (In re Arnold and Baker Farms)*, 177 B.R. 648, 652-53 (9th Cir. BAP 1994):

> The debtor Arnold and Baker Farms is an Arizona general partnership. The partnership was formed . . . for the purpose of farming and the sale and lease of farmland. Arnold and Baker purchased 1120 acres from Philip and Dorothy Ladra in 1975 and an additional 320 acres in 1979. The Ladras were given a first deed of trust on the property. In 1977, the farm began to experience financial difficulties.

[FmHA] and Western Cotton Services Corporation, a wholly owned subsidiary of Anderson Clayton Company, financed certain crops for the years 1978 through 1981. Additionally, FmHA lent Arnold and Baker sufficient funds to make the annual payments on the installments due to the Ladras in the years 1979, 1980, and 1983. In return, FmHA held a second deed of trust on Arnold and Baker's real property . . . . Western Cotton held a third deed of trust on Arnold and Baker's real property.

The Ladras ultimately instituted a judicial foreclosure proceeding against Arnold and Baker's real property. Subsequently, in April 1984, the Bakers individually filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code. The Ladras obtained relief from the automatic stay and continued their judicial foreclosure proceedings. Arnold and Baker, the partnership, filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in April 1986.

In May 1986, the bankruptcy court approved the sale of two pieces of real property free and clear of liens: 360 acres of real property to Cardon Oil Company and 480 acres to the entity known as the Corks. From the net proceeds of the sale and the payment of annual installments, Arnold and Baker satisfied the secured claim of the Ladras in the amount of $1,650,000. FmHA thereafter held a first priority and Western Cotton held a second priority lien in the property.

Arnold and Baker subsequently formulated two plans based on the income generated from the Cardon and Cork sales which proposed to pay in full the allowed claims of all creditors. The first plan was withdrawn when the Corks defaulted on their note

and the other, a revised plan, was withdrawn when Cardon Oil defaulted on its note. With respect to the Corks' default, Arnold and Baker negotiated a settlement pursuant to which the Corks tendered 360 acres to Arnold and Baker in lieu of foreclosure [footnote omitted]. With respect to the Cardon default, Arnold and Baker ultimately purchased the 320 acre parcel at a nonjudicial foreclosure [footnote omitted].

In January 1991, Arnold and Baker filed a second amended plan and disclosure statement. The second amended plan proposed to pay FmHA's $3,837,618 note and Western Cotton's $565,044 note in full. The plan proposed to transfer a proportionate fee simple interest in the 635 acre parcel of real property to FmHA and Western Cotton. FmHA was earmarked to receive 515 acres of real property and Western Cotton was earmarked to receive 77 acres. Arnold and Baker was earmarked to retain ownership of 48 of the 640 acres scheduled for distribution. Arnold and Baker proposed to sell the adjoining 360 acre parcel of real property in order to pay the administrative claims, United States Trustee's fees, attorney fees, accountant fees, postpetition taxes, the real estate commission due and owing to Walter Arnold, and use the remainder to pay the unsecured creditors. Arnold and Baker retained an interest in the property remaining after distribution and sale.

Both FmHA and Western Cotton initially objected to confirmation of Arnold and Baker's second amended plan. However, during the course of the confirmation hearing, Western Cotton reached a settlement with Arnold and Baker pursuant to which Western Cotton agreed to accept 130 acres of real property in full satisfaction of its debt. Western subsequently withdrew its objection to confirmation and voted to accept the plan.

> For purposes of the confirmation hearing, the parties stipulated that the second amended plan met all the requirements of [11 U.S.C.] § 1129(a)(1-13) with the exception of subsections (a)(3), (7), and (8). Additionally, FmHA objected to being crammed down pursuant to § 1129(b)(2). The principal factual issue concentrated on the fair market value of Arnold and Baker's 1320 acres of land. Arnold and Baker estimated the per acre value to be $7,322 for the 640 acre lot, $8,300 for the 360 acre lot, and $8,631 for the 320 acre lot. FmHA estimated the per acre value for the entire 1320 acres at $1,381.
>
> On May 5, 1993, the bankruptcy court confirmed the plan finding that the property had an estimated value of $7,300 per acre. However, the bankruptcy court modified the transfer to FmHA in the plan by ordering an additional 10% transfer to FmHA in order to compensate it for the costs associated with a sale [resulting in a total of 566.5 acres].

(End of quote from 177 B.R. at 652-53).

FmHA appealed to the Bankruptcy Appellate Panel ("BAP"), which reversed the bankruptcy court's order confirming the plan. In consolidated appeals, Arnold and Baker and Western Cotton appeal the BAP's reversal.

II

We first consider the issue of mootness. Appellant Western Cotton[1] argues that the BAP lacked jurisdiction to consider the appeal from the bankruptcy court insofar as the appeal related to the transfer of the 130 acres to Western Cotton,

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[1]Western Cotton is now known as Anderson Clayton Financial Services Corporation. We use its former name for the sake of consistency with the BAP opinion.

because the transfer was carried out before FmHA obtained a stay of the order confirming the plan. The Bankruptcy Court confirmed the plan on May 5, 1993, and FmHA filed its timely notice of appeal on May 14, one day before the expiration of the automatic stay provided in Bankruptcy Rule 7062. Three days later, on May 17, FmHA filed an emergency motion for a stay of plan confirmation pending appeal. The bankruptcy court held a preliminary hearing on the stay motion on May 20 and issued a temporary stay. However, 36 minutes before that hearing, Arnold and Baker quitclaimed the property to Western Cotton. In a motion for rehearing filed with the BAP, Western Cotton argued that the BAP lacked jurisdiction over the appeal because the appeal was moot as to Western Cotton.[2] The BAP denied the motion.[3]

Mootness is a jurisdictional issue which we review de novo. *Baker & Drake, Inc. v. Public Serv. Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994). Western Cotton argues that FmHA's failure to obtain a stay until after the property was quitclaimed to Western Cotton rendered the appeal moot because the transfer extinguished or modified rights to the extent that a court would be unable to fashion effective judicial relief if FmHA prevailed on appeal.

[1] However, this case presents neither of the two situations in which a dismissal for mootness is warranted. First, a court can dismiss an appeal as moot "if a party opposing a reorganization plan has failed to obtain a stay pending appeal, and the

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[2]Western Cotton also appeals the BAP's denial of Western Cotton's motion for an extension of time for filing the motion for rehearing. Because the BAP addressed the motion for rehearing on the merits notwithstanding its denial of the extension, we do not address this issue.

[3]The BAP based its denial of the motion on Western Cotton's concession at oral argument that the appeal was not moot. However, Western Cotton correctly points out that mootness is a jurisdictional issue, which this court must consider despite Western Cotton's apparent concession. *Baker & Drake, Inc. v. Public Serv. Comm'n (In re Baker & Drake, Inc.)*, 35 F.3d 1348, 1351 (9th Cir. 1994).

plan has been carried out to 'substantial [culmination].'" *Baker & Drake*, 35 F.3d at 1351 (quoting *In re Public Serv. Co. (Richman v. Northeast Utils. Serv. Group)*, 963 F.2d 469, 473 n.13 (1st Cir. 1992)) (alteration in original). For example, in *Trone v. Roberts Farms Inc., (In re Roberts Farms, Inc.)*, 652 F.2d 793 (9th Cir. 1981), the court affirmed a dismissal for mootness of an appeal from an order confirming a plan of reorganization, because "the many intricate and involved transactions" called for by the plan had been "so far implemented that it [was] impossible to fashion effective relief for all concerned." *Id.* at 797. Here, in contrast, only a single transaction has been carried out. Fashioning effective judicial relief would hardly require "putting Humpty Dumpty together again." *Baker & Drake*, 35 F.3d at 1352.

[2] The other situation in which a court can dismiss an appeal on the ground of mootness is "when an appellant neglected to obtain a stay pending appeal and the rights of third parties have intervened." *In re Spirtos (Spirtos v. Moreno)*, 992 F.2d 1004, 1006 (9th Cir. 1993). "The classic example of mootness in the bankruptcy context is a case in which the debtor has failed to seek a stay of foreclosure and the debtor's property has been sold. The transfer to a third party precludes meaningful relief." *Baker & Drake*, 35 F.3d at 1351. *See also Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 189 (9th Cir. 1977) (dismissing as moot appeals from orders approving and confirming sales and leases made to third parties not before the court). This case does not present such a situation because both Arnold and Baker and Western Cotton are parties to the appeal.[4] The bankruptcy court could fashion effective relief simply by ordering Western Cotton to return the 130 acres to Arnold and

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[4]Western Cotton responds that the transfer did affect the rights of others who are not parties to the appeal, namely, certain other entities who are co-liable on the indebtedness. However, Western Cotton cites nothing in the record identifying any such entities or evidencing any co-liability on their part.

Baker. Accordingly, we hold that the appeal is not moot as to Western Cotton.

III

We now turn to the merits. Appellant Arnold and Baker argues that the BAP erred in reversing the confirmation of the plan on the ground that the proposed transfer of 566.5 acres to FmHA would not provide "for the realization by [FmHA] of the indubitable equivalent" of its secured claim, as required by § 1129(b)(2)(A)(iii).[8]

[3] Because FmHA objected to confirmation of the plan, Arnold and Baker invoked the "cram down" provision of Chapter 11, which provides that the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the objection of an impaired creditor "if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan." 11 U.S.C. § 1129(b)(1). To be "fair and equitable" the plan must satisfy, with respect to secured claims, one of the following three tests:

> (1) The creditor is to retain the lien securing its claim and is to receive deferred cash payments with a present value at least equal to the claim;
>
> (2) The property securing the claim is to be sold and the lien is to attach to the proceeds of the sale;

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[8]Appellee FmHA, in addition to addressing this issue, also raises a number of other issues apparently as alternative grounds for denying confirmation of the plan. FmHA argues that the bankruptcy court's valuation of the land was clearly erroneous and that the bankruptcy court erred in holding that the plan satisfied the "best interests of the creditors" test provided in § 1129(a)(7) and the requirement of good faith provided in § 1129(a)(3). Because we affirm the BAP on the issue of indubitable equivalence, we need not address the other issues raised by FmHA.

the lien on the proceeds is then to be treated as described in test (1) or (3):

(3) The creditor is to realize the indubitable equivalent of its secured claim.

See 11 U.S.C. § 1129(b)(2)(A).[6]

[4] The bankruptcy court confirmed the plan on the ground that the plan satisfied the third requirement. After an evidentiary hearing on the issue of valuation, the court found that the property was worth $7.300 per acre. It then concluded that the receipt of 566.5 acres at $7.300 per acre would provide for

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[6]The full text of the statute provides, in relevant part:

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides —

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

11 U.S.C. § 1129(b)(2)(A).

FmHA to realize the indubitable equivalent of its secured claim.

[5] As an initial matter, we must address the appropriate standard of review of such a determination. Arnold and Baker argues that the question of indubitable equivalence is a question of fact to be reviewed under the clearly erroneous standard. We disagree. Although the value of the land is a finding of fact which we review for clear error, the ultimate conclusion of indubitable equivalence is a question of law which we review de novo because it requires analysis of the meaning of the statutory language in the context of the Bankruptcy Code's "cram down" scheme. *See Woods v. Pine Mountain, Ltd. (In re Pine Mountain)*, 80 B.R. 171, 172 (9th Cir. BAP 1987) ("Whether a plan provides a secured creditor with the indubitable equivalent of its claim is . . . a mixed question of law and fact. Although the facts underlying such a determination are reviewed under the clearly erroneous standard, the question of whether the legal standard has been satisfied is reviewed de novo.") (citing *United States v. McConney*, 728 F.2d 1195, 1201-03 (9th Cir. 1984) (en banc)). *But see Matter of James Wilson Assocs.*, 965 F.2d 160, 172 (7th Cir. 1992) (holding that indubitable equivalence is a question of fact reviewed for clear error).

[6] The BAP reviewed de novo the bankruptcy court's determination that the proposed transfer would provide FmHA with the indubitable equivalent of its secured claim, and reversed. Stressing that "[t]he determination of whether a partial dirt for debt distribution will provide the creditor with the indubitable equivalence of its secured claim must be made on a case-by-case basis," *Arnold and Baker Farms*, 177 B.R. at 662, the BAP reasoned that the bankruptcy court's valuation of the property was an insufficient basis on which to conclude that the property was the indubitable equivalent of FmHA's secured claim. Again, we adopt and quote verbatim from the BAP's opinion at 177 B.R. at 661-62:

The finding of a trial court of a particular value of real property . . . will not necessarily determine whether the creditor will receive the indubitable equivalent of its secured claim. Experience has taught us that determining the value of real property at any given time is not an exact science. Because each parcel of real property is unique, the precise value of land is difficult, if not impossible, to determine until it is actually sold. Nevertheless, bankruptcy courts have traditionally been requested, out of necessity, to determine the value of various types of property, including real property, and yet courts have recognized the difficulty of being able to determine accurately the value of land. For instance, in *In re Walat Farms Inc.*, 70 B.R. 330 (Bankr. E.D. Mich. 1987), the court stated:

> Similarly, we concede to doubts about our ability to fix the "value" of the land in question. We need not make a pronouncement that no plan proposing the surrender of a portion of mortgaged land to a mortgagee in return for a compelled release of the lien on the remainder of the property will ever be confirmed. Suffice it to say, however, that no matter how hot the market for real estate may become in the future, the market for farm real estate here and now is not such which would permit us to hold that the value of the land being offered is the indubitable equivalent of [the mortgagee]'s claim. "Indubitable" means "too evident to be doubted." *Webster's Ninth New Collegiate Dictionary* (1985). We profess doubt on the facts of this case.

Walat Farms, 70 B.R. at 334 (footnote omitted).

. . .

[T]he determination of whether a dirt for debt distribution provides a secured creditor with the indubitable equivalent of its secured claim must be made on a case-by-case basis, and we must decide whether the bankruptcy court's finding with respect to the value of the real property for the purpose of determining the amount of the creditor's secured claim provided the secured creditor with the indubitable equivalent of its claim. In addition, we conclude that in order for a partial distribution to constitute the most "indubitable equivalence," the partial distribution must insure the safety of or prevent jeopardy to the principal.

Although we conclude that the bankruptcy court's valuation in this case is not clearly erroneous, we are not convinced that its finding regarding the value of the real property provided the indubitable equivalence of the particular secured claim in question, nor are we convinced that the partial distribution of 566.5 acres to FmHA will insure the safety of or prevent jeopardy to the principal. [citation omitted].

The evidence at trial demonstrated that the value of the real property was far from certain. The Arnold and Baker appraisal admitted that due to unfavorable market conditions, including the fact that the [Resolution Trust Company had acquired 19,000 acres near Arnold and Baker's property and was considering bulk sale offers at no more than $2,105 per acre], the normal one year marketing period for the property would be extended by another two years [by which time the appraisal estimated that the Resolution Trust Company's activities would have ceased affecting the market].

The bankruptcy court agreed with Arnold and Baker's valuation of $7,300 per acre. FmHA, how-

ever, proffered a valuation of $1.381 per acre.[7] The large disparity in the parties' valuation of the same property illustrates the obvious uncertainty in attempting to forecast the price at which real property will sell at some uncertain future date.

The bankruptcy court found the value of each acre to be $7.300. and thus the value of the 566.5 acres to be transferred to FmHA to be $4,135.450 ($7.300 x 566.5). We must decide. therefore. whether a distribution of land with an estimated value of $4.135.450 constitutes the indubitable equivalent of a $3.837.618 claim secured by 1.320 acres. Under the circumstances of this case, we conclude uat it does not.

The partial distribution of 566.5 acres to FmHA will not insure the safety of or prevent jeopardy to the principal. FmHA originally lent funds to Arnold and Baker secured by 1320 acres of land. If Arnold and Baker defaulted on the terms of the note, FmHA bargained for the right to foreclose on the entire 1320 acres of land in order to satisfy the outstanding obligation. In this situation. the principal is protected to the extent of the entire 1320 acres held as security.

. . .

If FmHA subsequently sells the property for less than the value calculated by the bankruptcy court, FmHA has no recourse to the remaining collateral to satisfy the deficiency. As a result. the distribution to FmHA may not be "completely compensatory." *See In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d

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[7]The disparity was due in part to the parties' disagreement about the highest and best use of the property. Arnold and Baker argued that it was for land development. whereas FmHA maintained that it was for an irrigated farm. *See Arnold and Baker Farms*, 177 B.R. at 655.

> Cir. 1935) (Learned Hand, J.).[18] FmHA is forced to assume the risk of receiving less on the sale without being able to look to the remaining undistributed collateral for security. "[T]o the extent a debtor seeks to alter the collateral securing a creditor's loan, providing the 'indubitable equivalent' requires that the substitute collateral not increase the creditor's risk exposure." *In re Keller*, 157 B.R. 680, 683-84 (Bankr. E.D. Wash. 1993); *see also Aetna Realty Investors, Inc., v. Monarch Beach Venture, Ltd. (In re Monarch Beach)*, 166 B.R. 428, 436 (C.D. Cal. 1993) (fair and equitable prohibits a plan from unfairly shifting risk of plan failure to the creditor).

(End of quote from 177 B.R. at 661-62).

Arnold and Baker challenges the BAP's decision on the ground that it conflicts with *Matter of Sandy Ridge Development Corp.*, 881 F.2d 1346 (5th Cir. 1989),[9] in which the Fifth Circuit held that a "dirt for debt" plan satisfied the indubitable

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[18]The legislative history of § 1129 indicates that *Murel Holding* was the source of the "indubitable equivalence" standard. *See Matter of Sandy Ridge Development Corp.*, 881 F.2d 1346, 1350 (5th Cir. 1989); 124 Cong. Rec. H 11089 (daily ed. September 28, 1978) (statement of Rep. Edwards), *reprinted in* 1978 U.S.Code Cong. & Admin. News 6436 at 6475.

[9]Arnold and Baker also cites a number of decisions from bankruptcy courts approving dirt for debt plans. *See Matter of Atlanta Southern Business Park, Ltd.*, 173 B.R. 444 (Bankr. N.D. Ga. 1994) (plan called for part of collateral plus sum of cash to be transferred to creditor in full satisfaction of creditor's claim); *In re Simons*, 113 B.R. 942 (Bankr. W.D. Tex. 1990) (plan called for part of collateral to be transferred in exchange for credit against claim; balance of claim to be paid off by deferred payments and secured by lien on remaining collateral); *In re Elm Creek Joint Venture*, 93 B.R. 105 (Bankr. W.D. Tex. 1988) (same); *In re Bernard*, 70 B.R. 181, 185 (Bankr. E.D. Ark. 1986) (same); *In re Shorten*, 49 B.R. 722, 724 (Bankr. W.D. Mo. 1985) (same).

However, none of the plans in these cases required a secured creditor to accept part of its collateral in full satisfaction of its secured claim.

equivalence standard.[10] The BAP distinguished *Sandy Ridge* on the ground that the plan in that case provided for the transfer of all of the secured creditor's collateral, rather than only a portion of the collateral as in the present case. Arnold and Baker argues that even in the *Sandy Ridge* situation, the court's valuation of the collateral is critical to the creditor's substantive rights because the valuation directly impacts the creditor's rights regarding an unsecured deficiency claim, as was the case in *Sandy Ridge*.

[7] However, this argument misapprehends the indubitable equivalence analysis. Section 1129(b)(2)(A)(iii) does not require that a creditor receive the indubitable equivalent of its entire claim, but only of its secured claim. *See Sandy Ridge*, 881 F.2d at 1350; 11 U.S.C. § 1129(b)(2)(A)(iii) ("With respect to a class of *secured claims*, the plan provides . . . (iii) for the realization by such holders of the indubitable equivalent of *such claims*.") (emphasis added). *Sandy Ridge* explained that, in the case of an undersecured creditor,

> [s]ection 506(a) of the Bankruptcy Code bifurcates . . . [the] total claim into secured and unsecured portions. . . . In situations involving only one creditor and one debtor, the value of the undersecured creditor's secured claim is simply the value of the underlying collateral. The difference between the collateral's value and the amount of the debt becomes an unsecured claim and is added to the existing pool of unsecured claims.

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[10] A subsequent opinion denying the petition for rehearing clarifies that this was the holding of *Sandy Ridge*. *See Matter of Sandy Ridge Development Corp.*, 889 F.2d 663, 663 (5th Cir. 1989) (*Sandy Ridge II*) ("In denying the petition for rehearing, we observe that we have held that . . . the plan in question meets the requirements of 11 U.S.C. § 1129(b)(2)(A)(iii) . . . .").

Sandy Ridge, 881 F.2d at 1349 (citations omitted). In other words, the value of the secured portion of an undersecured creditor's total claim is *by definition* equal to the value of the collateral securing it. Therefore, a creditor necessarily receives the indubitable equivalent of its secured claim when it receives the collateral securing that claim, regardless of how the court values the collateral. For this reason, the *Sandy Ridge* court did not need a judicial determination of value, explaining that "for the present analysis, the exact value of [the collateral] is unimportant." *Id.* at 1349. The court's valuation of the collateral does, as Arnold and Baker observes, determine the amount of any remaining *unsecured* claim, but the Code requires only that the creditor receive the indubitable equivalent of its *secured* claim.

[8] In this case, in contrast, the amount of collateral deemed to be the indubitable equivalent of FmHA's secured claim depends entirely on the court's valuation of the collateral. If the court had found that the land was worth more than $7,300 per acre, FmHA would receive correspondingly less land, and if the court had found that the land was worth less, FmHA would receive correspondingly more. Our holding that this plan does not satisfy the indubitable equivalent requirement is therefore entirely consistent with *Sandy Ridge*'s holding that the plan in that case did.

CONCLUSION

[9] In conclusion, while we do not hold that the indubitable equivalent standard can never as a matter of law be satisfied when a creditor receives less than the full amount of the collateral originally bargained for, we do hold, as did the BAP, that the Arnold and Baker plan does not provide FmHA with the indubitable equivalent of its secured claim as required by the Bankruptcy Code.

The judgment of the BAP reversing the bankruptcy court's order confirming the plan is AFFIRMED.

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No. 96-365

In the Supreme Court of the United States

OCTOBER TERM, 1996

ARNOLD AND BAKER FARMS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the debtor's Chapter 11 reorganization plan, which would transfer to respondent United States only a portion of respondent's collateral, provided the "indubitable equivalent" of the respondent's secured claim, as required by 11 U.S.C. 1129(b)(2)(A)(iii).

2. Whether the court of appeals, after determining that the facts found by the bankruptcy court were not clearly erroneous, was prohibited from reviewing de novo the bankruptcy court's ultimate conclusion that the substitute collateral provided respondent the indubitable equivalent of its secured claim.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-56a) is reported at 85 F.3d 1415. The opinion of the Bankruptcy Appellate Panel (Pet. App. 8a-37a) is reported at 177 B.R. 648. The order of the Bankruptcy Court (Pet. App. 1a-7a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1996. The petition for a writ of certiorari was filed on September 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Arnold and Baker Farms is a partnership formed for the purposes of farming and selling and leasing farmland. Pet. App. 9a. In April 1986 petitioner filed a voluntary petition for relief in the United States District Court for the District of Arizona under Chapter 11 of the Bankruptcy Code. The Farmers Home Administration (FmHA)[1] filed a secured claim for approximately $3,837,618, plus interest accruing beginning June 30, 1991, at $594 per day. C.A. E.R. 127. Petitioner's second amended plan (the Plan), which is the plan at issue here, included a "dirt for debt" transfer through which petitioner proposed to satisfy FmHA's secured claim with a transfer of 515 acres of land, less than half of the 1320 acres securing the claim. Pet. App. 11a.

The parties disagreed sharply over the value of the land in the proposed transfer. Petitioner claimed that the best and highest use of the property was for land development, and it valued the land at $7,322 per acre. Pet. App. 18a & n.3. FmHA maintained that the best and highest use of the property was for farmland, and thus its value was only $1,381 per acre. *Id.* at 9a-11a, 18a. Accordingly, it opposed the Plan. Petitioner invoked the "cram down" provision of Chapter 11, under which a court may confirm a reorganization plan over

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[1] After the commencement of this litigation, the functions of the former Farmers Home Administration were transferred to the Consolidated Farm Service Agency which was, in turn, renamed the Farm Service Agency. See Department of Agriculture Reorganization Act of 1994, Pub. L. No. 103-354, § 226, 108 Stat. 3214 (Oct. 13, 1994); Memorandum from Mike Espy, Secretary of Agriculture, No. 1010-1 (Oct. 20, 1994). We refer to the agency as the Farmers Home Administration in this brief to avoid confusion.

the objections of an impaired creditor, provided the plan is "fair and equitable." 11 U.S.C. 1129(b)(1). A plan is "fair and equitable" to a secured creditor if it provides the creditor the "indubitable equivalent" of its secured claim. 11 U.S.C. 1129(b)(2)(A)(iii).

2. The bankruptcy court valued the land at $7,300 per acre and, after adding 53 acres to the transfer to FmHA to compensate it for the costs of selling the land, confirmed the Plan over FmHA's objection. Pet. App. 3a. The bankruptcy court concluded that the property was of "a value sufficient to satisfy [FmHA's] claims in full" and therefore provided FmHA with the "indubitable equivalent" of its secured claims. *Id.* at 5a.

3. The Bankruptcy Appellate Panel of the Ninth Circuit (BAP) reversed.[2] Pet. App. 8a-37a. Although the BAP was "troubled" that the bankruptcy court's valuation of the property "ignored the effect on the market" of a nearby 1900-acre parcel held by the Resolution Trust Corporation (RTC) and already on the market, *id.* at 21a, it did not consider the valuation clearly erroneous, *id.* at 22a. The BAP concluded, however, after de novo review, that the plan did not guarantee FmHA the indubitable equivalent of its secured claim. *Id.* at 31a, 33a. To constitute an indubitable equivalent, the partial transfer of collateral must be "completely compensatory" and must "insure the safety of or prevent jeopardy to the principal." *Id.* at 28a, 31a (quoting *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935)). The BAP concluded that FmHA's principal was jeopardized by the illiquidity of the property and the uncertainty of sale. The BAP

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[2] The BAP sat in lieu of the district court pursuant to 28 U.S.C. 158(b)(1).

noted that the RTC, unable to dispose of the 19,000 acres it held in the same area, had extended its normal one-year marketing period to three years. Pet. App. 31a. The BAP also observed that FmHA had proffered evidence supporting a much lower valuation for the land and that the "large disparity in the parties' valuation of the same property illustrates the obvious uncertainty in attempting to forecast" the sale price of the property "at some uncertain future date." *Ibid.* The BAP concluded that, "[u]nder the circumstances of this case," the proposed transfer therefore could not be deemed the indubitable equivalent of FmHA's claim. *Id.* at 32a.

4. The court of appeals affirmed. Pet. App. 39a-56a. It agreed with the BAP that the bankruptcy court's valuation of property was a question of fact, reviewable only for clear error, but that whether the property so valued constituted the indubitable equivalent of the creditor's secured claim was a question of law, reviewable de novo. *Id.* at 50a. The court of appeals also agreed with the BAP on the merits, holding that the Plan failed to provide FmHA with the indubitable equivalent of its secured claim as required by 11 U.S.C. 1129(b)(2)(A)(iii), because the partial distribution of collateral to FmHA did not insure the safety of, or prevent jeopardy to, the principal. Pet. App. 50a-56a.

ARGUMENT

The decision of the court below is correct in all respects. There is no dispute about the proper legal standard for determining indubitable equivalence, and the BAP and the court of appeals correctly applied that standard in concluding that petitioner's proposed Plan did not provide FmHA with the indubitable

equivalent of its secured claim. Although there is disagreement among the courts of appeals in articulating the standard of appellate review of indubitable equivalence determinations, this case was correctly decided under any standard that has been articulated. Moreover, the disagreement among the courts of appeals may dissipate in light of intervening decisions of this Court clarifying the applicable standards of appellate review of mixed questions of fact and law.

1. Petitioner argues (Pet. 9-13) that the court of appeals erred in concluding that its proposed dirt for debt transfer failed to provide FmHA with the indubitable equivalent of its secured claim. The court of appeals correctly decided that issue, however, and its decision does not conflict with that of any other circuit.

a. Congress chose a particularly demanding standard for protecting secured creditors: "'Indubitable' means 'too evident to be doubted.'" *In re Walat Farms, Inc.*, 70 B.R. 330, 334 (Bankr. E.D. Mich. 1987) (quoting *Webster's Ninth New Collegiate Dictionary* 615 (1985)). The "indubitable equivalence" requirement originated in *In re Murel Holding Corp.*, 75 F.2d 941, 942 (2d Cir. 1935) (L. Hand, J.). In determining whether a creditor received "adequate protection," Judge Learned Hand stated:

> It is plain that "adequate protection" must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safety of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no need to suppose that the statute

> was intended to deprive him of that * * *, unless by a substitute of the most indubitable equivalence.

Ibid. Congress's adoption of the "indubitable equivalence" standard reflects its intent that "[s]ecured creditors should not be deprived of the benefit of their bargain." H.R. Rep. No. 595, 95th Cong., 1st Sess. 339 (1977).[3]

b. The court of appeals correctly concluded that the Plan failed to satisfy this demanding standard. Even accepting the bankruptcy court's determination of the expected value of the land, its illiquidity and the risks associated with its sale prevent it from constituting the indubitable equivalent of FmHA's secured claim. Petitioner own appraisal, which was accepted by the bankruptcy court, acknowledged that the "problems of the area" would require FmHA to hold the property for two years before selling it, Pet. App. 19a n.4, thus shifting to FmHA the risks that the forecast of the value was incorrect or that the market would decline. FmHA also bears the risk that land development will not prove to be the best and highest use of the land; this risk is real, given that the land, although annexed by an adjacent city, was without city water, sewer, and other services. C.A. E.R. 409, 420-422. Further undermining confidence in the equivalence of the substitute collateral was RTC's contemplation of the bulk sale of adjacent lands at no more than $2,105 per acre. Pet. App. 52a. The profound difference of expert opinions regarding the value of the land only underscores the dubious

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[3] "[I]ndubitable equivalen[ce]" is also used in 11 U.S.C. 361, a related provision addressing "adequate protection" for creditors, but appears nowhere else in the U.S. Code.

equivalence of this transfer. Compare *id.* at 31a-32a with *Murel*, 75 F.2d at 942-943. In these circumstances, a creditor shoulders considerable risks that the transfer of the substitute collateral will not be "completely compensatory," *Murel*, 75 F.2d at 942, or "insure the safety of or prevent jeopardy to the principal," Pet. App. 31a. Consequently, the transfer does not provide the indubitable equivalent of the secured claim.

c. Contrary to petitioner's assertion (Pet. 5), the court of appeals did not hold "as a matter of law" that the partial distribution of collateral could never satisfy the indubitable equivalence standard. To the contrary, both the court of appeals and the BAP stressed that "[t]he determination of whether a partial dirt for debt distribution will provide the creditor with the indubitable equivalence of its secured claim must be made on a case-by-case basis." Pet. App. 50a, 32a. Petitioner has cited no court of appeals decision in which an analogous plan was forced upon a creditor. Its reliance on *In re Sandy Ridge Development Corp.*, 881 F.2d 1346 (5th Cir. 1989), is unavailing. In that case, the reorganization plan called for the transfer of *all* the property securing the claim. The court concluded that "since common sense tells us that property is the indubitable equivalent of itself," the plan satisfied Section 1129(b)(2)(A)(iii), without regard for the exact value of the land. 881 F.2d at 1349-1350. The court of appeals below correctly distinguished *Sandy Ridge* as dealing with the transfer of the entire collateral. Pet. App. 56a; see also *id.* at 54a n.9 (observing that none of the other "dirt for debt" decisions cited by petitioner "required a secured creditor to accept part of its collateral in full satisfaction of its secured claim"). In such a case, valuation

is "unimportant" for resolving the issue of indubitable equivalence. *Sandy Ridge*, 881 F.2d at 1349.

2. a. The court of appeals correctly reviewed de novo the bankruptcy court's ultimate conclusion of indubitable equivalence. A determination of indubitable equivalence under Sections 361(3) and 1129(b)(2)(A)(iii) of the Bankruptcy Code is a classic mixed question of fact and law: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated." *Pullman-Standard* v. *Swint*, 456 U.S. 273, 289 & n.19 (1982). Here, the underlying fact to be established is the expected value of the collateral; the bankruptcy court makes that valuation based on a preponderance of the evidence, and that determination is subject to review only for clear error. But the court's ultimate decision—whether, based upon the factual findings, a plan provides a creditor with the indubitable equivalent of a secured claim—is correctly subject to independent appellate review. Cf. *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 560 (1985); *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481, 491 (1937).

A determination of indubitable equivalence is analogous to the determination of a "fair use" of copyrighted material. In copyright, once the district court makes factual findings relative to the four factors that comprise fair use—the purpose of the use, the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect on the market for the copyrighted work—an appellate court may independently review the ultimate de-

termination of whether the challenged use is fair. *Harper & Row*, 471 U.S. at 560-561. Similarly, in bankruptcy, once the bankruptcy court makes factual findings about the valuation of property, the appellate court may independently review the ultimate determination of whether the proposed cram down provides the indubitable equivalent of a creditor's secured claim—that is, whether the plan is "fair and equitable." Cf. *Ornelas* v. *United States*, 116 S. Ct. 1657, 1658, 1662 (1996) (although findings of historical fact surrounding search are to be reviewed "only for clear error," "[t]he ultimate questions of reasonable suspicion to stop and probable cause to make a warrantless search should be reviewed *de novo*"); *Thompson* v. *Keohane*, 116 S. Ct. 457, 466 (1995) (once underlying facts surrounding an interrogation are resolved, ultimate determination of whether a person was "in custody" is subject to independent review).

This standard of review appropriately recognizes that the subsidiary question of expected value and the ultimate question of indubitable equivalence are distinct. The bankruptcy court values collateral based on a preponderance of the evidence before it. Where there is a ready market for collateral, its value may be determined with ease and certainty. See, *e.g.*, *In re George Ruggiere Chrysler-Plymouth*, 727 F.2d 1017, 1020 (11th Cir. 1984). In such cases, collateral so valued generally will provide the creditor with the indubitable equivalent of a secured claim that is not of greater value. In contrast, where the market for the collateral is remote or uncertain, the bankruptcy court's valuation of the collateral, even if well supported, may or may not provide the degree of protection required by the indubitable equivalence standard. Compare *In re Walat Farms, Inc.*, 70 B.R. at 335

("[N]o matter how hot the market for real estate may become in the future, the market for farm real estate here and now is not such which would permit us to hold that the value of the land being offered is the indubitable equivalent of [the creditor's] claim.") (footnote omitted), with *In re James Wilson Associates*, 965 F.2d 160, 172 (7th Cir. 1992) (creditor was provided with indubitable equivalent of lien where security was worth almost twice as much as loan and expert testimony established that excess security provided considerable cushion against impact of potential default).

b. Petitioner correctly points out (Pet. 4-5) that other courts of appeals have treated indubitable equivalence or adequate protection determinations as wholly factual, and thus reviewable for clear error. See *In re James Wilson Associates*, 965 F.2d at 172; *In re O'Connor*, 808 F.2d 1393, 1396 (10th Cir. 1987); *In re Martin*, 761 F.2d 472, 474 (8th Cir. 1985); *In re Snowshoe Co.*, 789 F.2d 1085, 1088 (4th Cir. 1986); *In re George Ruggiere Chrysler-Plymouth*, 727 F.2d at 1020.[4] The practical significance of this conflict, how-

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[4] Petitioner errs, however, in stating that the Fifth Circuit reviews indubitable equivalence determinations only for clear error. In *In re Sun Country Development, Inc.*, 764 F.2d 406, 409 (1985), that court appeared to distinguish between the bankruptcy court's factual findings and its ultimate conclusion:

> To the extent [the creditor] attacks the findings of the bankruptcy court, we reject his complaints, as the findings were supported by the evidence. We further believe that [the creditor's] other concerns do not render the [substitute collateral] dubitable equivalent of the original first lien.

A subsequent panel of the Fifth Circuit left open the question whether adequate protection was wholly a question of fact. *In re First South Savings Ass'n*, 820 F.2d 700, 711 (1987) (finding

ever, is unclear. In *Martin*, for example, while the Eighth Circuit viewed adequate protection (which can be achieved through indubitable equivalence) as a question of fact, it reviewed de novo the bankruptcy court's adequate protection finding on the ground that it was predicated on a misunderstanding of the law. 761 F.2d at 475. The bankruptcy court's error was to give "insufficient weight to * * * the Congressional goal of affording the secured creditor the benefit of its bargain," by failing to identify and take proper account of the risks associated with the debtor's proposal. *Id.* at 478 (quoting *In re American Mariner Indus., Inc.*, 734 F.2d 426, 434-435 (9th Cir. 1984)). This analysis, under which the Eighth Circuit independently reviewed and reversed an indubitable equivalence determination that failed to protect the secured creditor against risks of unsecured losses, differed little from the analysis of the decision below.

Moreover, several of the circuits that have adopted the clearly erroneous standard for reviewing indubitable equivalence determinations did so a decade ago, without the benefit of this Court's recent decisions concerning mixed questions of law and fact. Given the opportunity, those circuits might reexamine their precedent and adopt a standard consistent with *Ornelas*, *Keohane*, *Harper & Row*, and the decision below.

Finally, for the reasons discussed at pages 6-7, *supra*, the application of a narrower standard of review would not likely change the result in this case.

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no need to decide whether "adequate protection is a finding of fact, reviewed only under the narrow 'clearly erroneous' standard" because challenged plan failed even that deferential standard).

Given the uncertainties and risks surrounding the sale and value of the land at issue, the bankruptcy court clearly erred in concluding that it constituted the indubitable equivalent of FmHA's secured claim. This case, therefore, would not provide a good vehicle for plenary consideration of the issue.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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